No: 93-146

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,

Petitioners,

VS.

BEHM FUNERAL HOMES, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; and DARRYL THROCKMORTEN, an individual,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court in evaluating a *per se* illegal conspiracy claim to fix prices under section 1 of the Sherman Act erred when it affirmed summary dismissal under Rule 56 despite the presence in the record of such admittedly "undisputed" and direct conspiratorial evidence (1) that competitors met, (2) that at their meetings they discussed such alternative solutions to the "threat" of other competitors as (a) a "fee" charged consumers buying the other competitors' product, (b) advertisements "warning" consumers about the other competitors' product and (c) the outright purchase of one of the other competitors and (3) that the competitors implemented the advertising as they agreed and (4) that they actually "imposed" the "fee" on consumers.

2. Whether a court, that neglected to evaluate under *Matsushita* and *Monsanto*, as well as under the recent *Kodak* decision, the whole of a record including admittedly "undisputed" conspiratorial facts from which a jury could infer that competitors conspired to fix prices in *per se* violation of section 1 of the Sherman Act, erred when it affirmed summary dismissal of a claim under Rule 56 on the sole ground that the competitors could not have illegally conspired to fix prices, despite the presence in the record of substantial "undisputed" conspiratorial facts, since not all of the competitors imposed upon consumers a "fee" at exactly the same time or imposed a "fee" that was exactly uniform in amount.

3. Whether a court in affirming dismissal under Rule 56 of a section 1 tying claim on grounds (1) that each competitor did not actually condition the availability of its "service" to consumers based upon their purchase from it of a "product," (2) that each competitor lacked sufficient market power in the tying "service," and (3) that each competitor did not injure competition, erred under the recent *Kodak* decision when it failed to consider the whole of a record – including such "undisputed" facts that each competitor attended competitors' meetings, discussed charging "fees" to consumers who did not purchase the product along with the service, discussed anti-competitive public "warnings" of the "dangers" and "problem" of other competitors' product and decided "what to do about them" – from which a jury could infer under *Kodak* that each

competitor did condition the availability of its service upon the purchase of its product and that each competitor through implemented attempts to eliminate the "dangers" and "problem" of competition by imposing a fee did have sufficient market power and did destroy competition, especially in light of the fact that competitors sold a licensed and "unique service" that it leveraged in order to maintain sales of a product it packaged with that service.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported, is styled "not for publication," and is reproduced at Appendix pp. A-1-9. The opinion of the United States District Court for the Western District is reported at 797 F. supp. 1276 (W.D. Pa. 1992), and is reproduced at Appendix A-10-35.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on April 26, 1993. A-1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This petition seeks review of a decision that results in higher prices for consumers purchasing burial services packaged with caskets from licensed funeral directors. Petitioners alleged that through joint association activities, that violate section 1 of the Sherman Act, the funeral directors imposed a fee upon consumers to recoup substantial profits lost to competitive casket sellers who created for consumers a lower-priced competitive alternative to funeral directors' packaged sales. Each funeral director that tied burial services with casket sales also violated section 1 of the Sherman Act.

Petitioners Greene County Memorial Park and Greene County Monument and Vault Company ask this Court to review a decision and Judgment of the United States Court of Appeals for the Third Circuit affirming an Order of the United States District Court for the Western District of Pennsylvania which granted funeral directors' Motion for Summary Judgment under Rule 56 of the Federal Rules

of Civil Procedure. The Third Circuit affirmed, although it found facts in the record from which a jury (1) could infer the existence of a conspiracy among or between the funeral directors through their association activities to recoup profits by increasing consumers' prices on packaged burial service by imposing a fee upon them for purchasing caskets competitively from sellers like Petitioners and (2) could also infer the existence of an arrangement whereby each funeral director tied the availability of burial services to the purchase of caskets.

The Third Circuit and the District Court have through their incorrect application of *Matsushita* and *Monsanto*, while ignoring *Kodak*, virtually eliminated antitrust prosecution in the Third Circuit. Direct conspiratorial evidence no longer guarantees injured parties their day in court.

A. *Facts*

Petitioners, Greene County Memorial Park and Greene County Memorial and Vault Company, are Pennsylvania corporations located and formerly doing business in Greene County, Pennsylvania. Petitioner Greene County Memorial Park owned and operated a cemetery in Greene County, Pennsylvania, and Petitioner Greene County Monument and Vault Company sold caskets and vaults to consumers. (A-11).

Funeral directors own and operate funeral homes, also located in Greene County, Pennsylvania, and are licensed by the Commonwealth of Pennsylvania to provide funeral services. (A-11). In addition to providing licensed funeral services, funeral directors sell caskets and vaults and have sold these products in Greene County, Pennsylvania in competition with Petitioners and other so-called third-party casket sellers. (A-12).

Funeral directors offer consumers "package deals" whereby "customers could receive funeral services, caskets and vaults all for one price," but some funeral directors "imposed casket handling fees when customers purchased caskets or vaults from others." (A-18). Funeral directors from 1984 through 1990 provided about

75% of all funeral services in Greene County for all decedents dying in Greene County. (A-5 & 25).

Funeral directors were members of various associations, and at meetings discussed competitive casket and vault sellers and their pricing. (A-12 & 24). Funeral directors discussed pricing because they were being "underpriced" by Petitioners and other competitive third-party casket and vault sellers to whom funeral directors were losing "substantial profits." (A-2).

In response to this perceived competitive "threat," funeral directors at their associations discussed the "problem" of competitive third-party sellers and discussed several solutions to casket competitors' sales and "what to do about them." (A-2). Funeral directors devised one solution whereby they "acted together" (A-30) and "warned" consumers in advertisements of the "dangers" of doing business with third-party sellers (A-2). Funeral directors "warned" consumers that they would not "gladly" accept caskets purchased from competitive casket sellers. (A-12-13).

It was "through their trade associations" that funeral directors "imposed" a "casket handling fee" upon consumers who did not purchase a casket from a funeral director. (A-2). This fee, as well as the advertised consumer warnings, were among several responses to the competitive "threat" discussed at association meetings, along with the "problem" of competitive casket sellers who "underprice" funeral directors. Funeral directors did implement casket handling fees; they added fees to their price lists and charged fees that ranged from $200 to $425. (A-3). Not all funeral directors simultaneously adopted a fee, or adopted a "uniform" fee. (A-2).

Consumers contracting for burial services with a particular funeral director, but purchasing caskets competitively can either pay a casket handling fee or attempt to move a decedent's body to a funeral director not charging the extra fee (although such movement would violate Pennsylvania law). (A-7). However, consumers shopping for burial services in Greene County would have alternatives limited to funeral directors who provided 75% of the County's burial services (plus other funeral directors not defendants in this action), and who through associations discouraged competitive cas-

ket purchases and the "problem" they created. Indeed, funeral directors discussed solving the competition "problem" entirely and at association meetings considered purchasing Petitioners outright. (A-15).

One of Petitioners' corporate officers was informed by a funeral director of the association meetings and that funeral directors were "going to have to get together to see what they could do" about Petitioners since they were now a competitor. (A-13). Another funeral director told a second corporate officer that he was going to stop purchasing vaults from Petitioners because of what he had heard at an association meeting about Petitioners selling caskets. (A-13-14). Both corporate officers were told on several occasions by consumers that they had intended to purchase caskets and vaults from Petitioners, but changed their minds after speaking with a funeral director. (A-31-32).

Another funeral director lectured at association meetings on funeral directors "properly pricing" their burial services when the service included a competitively purchased casket. (A-29). At meetings there were discussions that such "properly priced" funeral services will cover a funeral director's costs when handling a competitively purchased casket. (A-29).

An association also surveyed funeral director members as to casket handling fees and the prices they charged consumers. (A-29).

B. *Procedural History*

On February 2, 1988, Petitioner filed this action against funeral directors in the United States District Court for the Western District of Pennsylvania under both Sherman and Clayton Acts, 15 U.S.C. §§1 and 14 respectively, and under Pennsylvania law for tortious interference with contractual relations. (A-10).

On September 17, 1991, Defendant funeral directors filed Motions for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure and Petitioners filed a Cross-Motion for Summary Judgment. (A-10).

By Opinion and Order dated July 7, 1992, the District Court concluded, as to the claim under §1 of the Sherman Act that Petitioners conspired illegally and in *per se* violation of §1 of the Sherman Act by agreeing to impose casket handling fees upon consumers to penalize them for purchasing competitive caskets and to destroy casket competition, that such claim is not "so obviously anti-competitive as to warrant ordination as a *per se* violation of section 1 of the Sherman Act" and must be evaluated under a rule of reason analysis which the District Court neglected to conduct. (A-30-31-32). The District Court then granted funeral directors' Rule 56 motions.

The District Court dismissed Petitioners' section 1 tying claim under both *per se* and rule of reason analyses. Under a *per se* analysis, the District Court found that each funeral director lacked sufficient market power, while under the rule of reason it found that each funeral director's alleged tying arrangement failed to injure competition.

The Third Circuit found "undisputed" that Defendant funeral directors "met", that they "discussed" competitors and their competitive casket sales and "what to do about them," that they "imposed a 'casket handling fee'" upon consumers who did not purchase caskets from them and that they also "warn[ed]" consumers of the "dangers" of buying competitive caskets. (A-2). The Third Circuit further found that competitive casket sellers "under-pric[ed]" funeral directors, that this price competition "depriv[ed] funeral directors of substantial profits" and that funeral directors advertised consumer warnings through association activities. (A-2).

Despite such "undisputed" facts, the Third Circuit affirmed by Judgment dated April 26, 1993 the District Court's refusal to allow a jury to hear these facts from which it could properly infer a *per se* illegal price fixing conspiracy by the funeral directors in violation of section 1 of the Sherman Act. The Third Circuit in holding that "a rational jury could not infer a concerted effort to fix prices," ignored *Eastman Kodak Co. v. Image Technical Services*, 112 S.Ct. 2072 (1992), but invoked both *Matsushita Electrical Industrial Corp. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1446, 1470-71 (1984), while

applying neither to the admittedly "undisputed" facts. If the Third Circuit had relied upon *Matsushita*, it would have found that funeral directors' conduct was not "consistent with both permissible and anticompetitive motives," and that there was no evidence "tending to exclude the possibility that Defendants acted independently."

"Undisputed" facts that funeral directors met, that they discussed the "problem" and "dangers" of competitive casket sales and "what to do about them," exclude any "possibility" under *Matsushita* that funeral directors acted "independently" when through their trade associations they "imposed a 'casket handling fee' for caskets not purchased" from them. Such activities are not consistent with "permissible . . . motives." If analyzed within the context of the "problem" and "dangers" of competition, such activities would be found to be so anticompetitive in motive that they could not possibly also be "consistent" with "permissible . . . motives."

Funeral directors were facing the "problem" and the "dangers" of competition that were "depriving . . . funeral directors of substantial profits." (A-2). Funeral directors' anti-competitive response was to warn the public and to impose a fee. As the Third Circuit recognized, funeral directors "acted in concert" (A-7-8), and in "warning the public of the 'dangers' of buying . . . from . . . these sellers [that included Petitioners] . . . they imposed a 'casket handling' fee [on consumers]." (A-2).

Funeral directors' purpose was to recoup the "substantial profits" which they were "depriv[ed]" by sellers that "underpric[ed]" them and which created for them a competitive "problem" and a "perceived threat." (A-2). Yet the Third Circuit denied Petitioners a jury trial, and totally ignored that funeral directors attempted no justification of their conduct as pro-competitive. Since casket fees were not precisely "uniform" in amount, were not simultaneously adopted at precisely the same time and their amounts were not discussed at association meetings, the Third Circuit affirmed the District Court's Order dismissing Petitioners' Complaint. (A-2). The Third Circuit made no attempt either under *Monsanto* to analyze the "undisputed" facts and whether they would be sufficiently concrete to overcome any concern that evidence of "ambiguity" would be the only evidence submitted to a jury, or under *Kodak* to focus on

these "undisputed" facts which constitute "the particular facts disclosed by the record." *Kodak*, 112 S.Ct. at 2082.

In the absence of coercion and of an express contractual requirement tying caskets to the availability of services, the Third Circuit declined to find a tying arrangement. The Third Circuit also could not establish from facts of record that each funeral director possessed sufficient market power over the tying product under the *per se* rule, or find that each funeral director's tying arrangement harmed competition under the rule of reason. In evaluating the District Court's dismissal of Plaintiffs' section 1 tying claim, the Third Circuit distinguished *Kodak*, finding it "inapposite" because "[o]bviously, neither funeral services nor caskets are unique, so the market power that existed in *Kodak* is simply not present here." (A-6). That funeral services required licensure and created market power that the funeral directors extended to caskets was ignored by the Third Circuit.

Joining Petitioners in their appeal to the Third Circuit was the Attorney General of the Commonwealth of Pennsylvania who in a brief of Amicus dated January 21, 1993, argued that summary judgment should not have been granted by the District Court since the District Court recited in its own opinion "substantial evidence of activities from which a jury could infer violations of the antitrust laws." The District Court's decision, argued the Commonwealth, "restricts" its ability on behalf of its citizens to enforce federal antitrust laws under 15 U.S.C. §15c; 71 P.S. §732-204(c). Following the Third Circuit's affirmation of the District Court's order granting summary judgment to Defendant funeral directors, the Third Circuit denied Plaintiffs' Motion for Reconsideration.

On May 27, 1993, the District Court, upon its determination "that it is clear from the record that the Petitioners' counsel violated Federal Rule of Civil Procedure 11 in continuing to prosecute this action after it was apparent that it had no merit", ordered counsel for funeral directors to submit affidavits "summarizing the number of hours they spent on this case, their expenses and their hourly rate." Counsel for funeral directors submitted affidavits summarizing hours, expenses, and rates, and claimed nearly $250,000 in attorneys' expenses and costs.

On June 10, 1993, Petitioners filed a Motion for Reconsideration by the District Court of its finding that they and their counsel violated Rule 11 by "continuing to prosecute this action" after it was "apparent" it had "no merit." In its motion, Petitioners respectfully directed the District Court to the Amicus brief of the Commonwealth of Pennsylvania and to its reasoned opinions that summary judgment should not have been granted, that the District Court recited substantial evidence from which a jury could infer that funeral directors violated the antitrust laws, that the District Court's decision conflicts with settled law, and that the District Court's decision will "restrict" the Attorney General's ability to enforce federal antitrust laws.

The District Court and the Third Circuit found insufficient facts from which a jury could infer both the existence of a conspiracy in violation of section 1 and the existence of illegal tying arrangements. Petitioners respectfully disagree, and Petitioners and their counsel now face Rule 11 sanctions for their differences with the District Court over the meritorious quality of the factual record developed in this action.

REASONS FOR GRANTING THIS PETITION

This petition presents the Court with a broad public policy issue of national significance involving professional funeral directors licensed to serve the public and whether such licensed professionals can be permitted to use their legalized burial service leverage to destroy benefits to the public that would otherwise accrue from competitors selling to the public an essential and vital product at reduced prices in rivalry with the funeral directors, who would conspire against the competitors by imposing fees upon consumers purchasing from them, and who would only sell packaged sales of burial services and caskets in violation of section 1 of the Sherman Act. Moreover, the Third Circuit and the District Court in their respective opinions have extended *Matsushita* to such lengths that direct conspiratorial evidence will in this Circuit never be heard by a jury.

This petition also will allow this Court to correct a manifest injustice, to correct the Judgment of the Third Circuit in its affir-

mance of the District Court's dismissal that prevents Petitioners from presenting to a jury "undisputed" facts that implicate Defendant funeral directors, to correct the Third Circuit's failure to analyze the "undisputed" facts under *Matsushita* and *Monsanto* and to apply the recent lessons of *Kodak* correctly.

For these reasons, this Court should grant this petition and correct manifest errors that unjustly prevent Petitioners from presenting a jury with facts which implicate funeral directors in serious section 1 violations designed to destroy competition.

I.

A JURY COULD RATIONALLY INFER THE EXISTENCE OF A CONSPIRACY FROM THE FACTS IN THE RECORD DEVELOPED IN THIS ACTION

Facts which the Third Circuit found "undisputed" – that the alleged conspirators attended meetings, that they conducted at these meetings discussions about the "problem" of competitive casket sales and "what to do about them," that they advertised "warning[s]" to consumers of the "dangers" of competitive casket sellers, and that they "imposed" a casket handling fee upon consumers purchasing from competitors (A-2) – are powerful, they are unambiguous, they are direct evidence of a *per se* illegal conspiracy, and they are buttressed by other facts. Yet, they were incredibly found by the lower courts as not sufficient to get Petitioners' past funeral directors Rule 56 motions.

The Third Circuit paints a vivid factual picture of rivalry, diminished profits and retaliation in a struggle between "a cemetery and a group of funeral directors" (A-2) from which a jury could infer the existence of a conspiracy. "In recent years," according to the Third Circuit, "funeral directors have come under competition from third-party sellers of caskets and vaults" who "underprice" the funeral directors, thus "depriving the funeral directors of substantial profits." (A-2). In response "to this perceived threat," the funeral directors met, discussed third-party sales and "what to do about them," and implemented their anti-competitive responses. (A-2). Clear

conspiratorial evidence, yet the Third Circuit would want more. The Third Circuit has extended *Matsushita* and *Monsanto* far beyond what this Court ever intended.

One funeral director admitted that the funeral directors were "going to have to get together to see what they could do" about Petitioners' casket competition (A-13), while another funeral director candidly advised one of Petitioners' officers that he was going to stop purchasing vaults from Petitioners because of what he had heard at one of their meetings about Petitioners selling caskets. (A-13-14). Consumers, also, told two of Petitioners' officers that they had intended to purchase caskets from Petitioners but that they changed their minds after speaking with a funeral director. (A-31-32). Moreover, one funeral director lectured to other funeral directors at association meetings about "properly pricing" their services when a service includes a competitively purchased casket. (A-29). That particular association also surveyed its funeral director members as to casket handling fees and the prices they charged consumers. (A-29).

The totality of these facts are direct evidence of a conspiracy in that funeral directors conspired to raise their burial service charges in order to penalize consumers who would purchase caskets competitively. However, the Third Circuit and the District Court in their respective opinions interpret the law so broadly that persuasive conspiratorial evidence will never get to a jury.

Certainly, there is abundant "direct. . . [and] circumstantial evidence that reasonably tends to prove that [the funeral directors] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *See, Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Moreover, the record is absolutely barren of any facts such that this "inference of conspiracy" would be unreasonable "in light of . . . competitive inferences of independent action . . . that could not have harmed" Petitioners. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Funeral directors have no facts supporting "competing inferences"; the Third Circuit discuss no possibilities of "independent action" and funeral directors' conduct could never be labeled "reasonable."

In light of the direct evidence of conspiratorial meetings, of anti-competitive discussions, and anti-competitive impositions and warnings, the fees that were imposed, as well as the fees that were maintained or that were later imposed, regardless of whether at the lower or upper reaches of the $200 to $425 range, would violate section 1, and a jury would be entitled to reach that conclusion.

If fees were imposed "at different times and in different amounts," these differences are not critical because of the "undisputed" conspiratorial meetings and the anti-competitive imposition of the fees themselves. The facts are clear that funeral directors worked together closely on the fees they imposed. Moreover, since some conspirators if "not all of the Defendants" (A-3) implemented fees over the relevant time frame, each implementation would further support inferences of a conspiracy. There simply is no factual basis for the Third Circuit's concern that no jury could rationally infer a conspiracy from these "undisputed" facts, especially in light of the "particular facts of the record" upon which the *Kodak* Court instructed the Third Circuit to "focus." *Kodak*, 112 S.Ct. at 2082.

The Third Circuit had a duty "to look at the whole picture" and to give petitioners "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *See, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). *See, also, In re Workers Compensation Insurance Antitrust Litigation*, 867 F.2d 1552, 1563, 1566 (8th Cir.), cert. denied, 492 U.S. 920 (1989), ("we emphasize that a piece meal analysis must be avoided and the overall conduct of the defendants must be weighed").

The Third Circuit erroneously focused on imposition of the fees imposed at "different times" and in "different amounts" and ignored funeral directors "overall conduct" and the whole of the conspiratorial picture as portrayed by the record. The Third Circuit and the District Court usurped a jury's function by not evaluating the "whole picture." By deprecating bits and pieces of evidence instead of fitting these pieces into the whole conspiratorial picture, it also violated clear Supreme Court mandates recently expressed in *Kodak*. The Third Circuit confuses its role with that of a fact-finder.

II.

A COURT MUST DO MORE IN AFFIRMING DISMISSAL OF A *PER SE* SECTION 1 PRICE FIXING CLAIM THAN INVOKE THE SPECTER OF *MATSUSHITA* AND *MONSANTO;* IT MUST ACTUALLY ANALYZE AND EVALUATE UNDER BOTH DECISIONS FACTS IT FINDS "UNDISPUTED" AND IT MUST NOT IGNORE *KODAK*

The Third Circuit upon paying homage to *Matsushita* and *Monsanto,* promptly affirmed dismissal without analyzing critical "undisputed" facts. It applied neither the law of *Matsushita* or *Monsanto* to these critical conspiratorial facts, and ignored *Kodak's* recent Rule 56 lessons.

For an antitrust plaintiff to avoid summary judgment it must point to facts "tending to exclude the possibility that defendants acted independently" if the "defendants' conduct [was] consistent with both permissible and anti-competitive motives." *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1356 (1986). Although citing *Matsushita,* the Third Circuit neither analyzes "the possibility that Defendants acted independently," nor does it evaluate whether the challenged conduct was "consistent with both permissive and anti-competitive motives." Content with its finding that alleged conspirators imposed fees "at different times and in varying amounts," the Third Circuit affirmed.

The Third Circuit characterized Petitioners' *per se* section 1 claim as including allegations that funeral directors conspired to fix prices by adopting a *uniform* casket handling fee. Assuredly, the record as the Third Circuit would interpret it supports inferences of a conspiracy, of a conspiracy to impose fees that increases prices and of a conspiracy that increases prices through the casket handling fee device. Petitioners *never* argued that this device had to be absolutely "uniform" for the conspiracy to violate section 1. However, through its mischaracterization, the Third Circuit easily affirmed the claim's dismissal without having to analyze facts under *Matsushita, Monsanto,* or *Kodak* and whether these facts

were so "highly ambiguous" that a jury could not be permitted to draw an inference of a conspiracy from the "particular facts of the record."

Relevant facts in this record are not "highly ambiguous"; indeed, some critical conspiratorial facts are "undisputed." Funeral directors attended meetings and conducted discussions at these meetings about the "problem" of competitive casket sales. They were concerned about the "dangers" of consumers buying competitively sold caskets, and they ran advertisements "warning" consumers of these "dangers." They lost "substantial profits" to this competition and to its "underpric[ed]" caskets and they "imposed" casket handling fees on consumers who bought competitive caskets. (A-2). In response to this competitive "threat," funeral directors through their association ran series of advertisements "warning the public of the 'dangers' of buying" competitive caskets and "imposed" a casket handling fee. That the funeral directors both ran the advertisements and imposed a fee are facts the Third Circuit found "undisputed," yet it affirmed the District Court's dismissal of Petitioners' complaint without analyzing such critical facts under either *Matsushita* or *Monsanto*.

The Third Circuit noted elliptically under *Monsanto* (A-3) that juries may not "draw inferences from highly ambiguous evidence" but it does not explain how its admittedly "undisputed" facts could be "ambiguous," or how meetings, discussions and impositions of fees through association conduct could be anything other than direct and non-ambiguous evidence of a section 1 violation. If fees "were imposed . . . at different times and in varying amounts" this fact cannot dispel conspiratorial evidence of meetings, discussions and impositions upon consumers. Certainly, there is no "possibility" that such anti-competitive, anti-consumer activities could have been undertaken to benefit competition and to enhance consumer welfare. In effect, the Third Circuit would re-write the law of conspiracy, requiring far more to prove a conspiracy that this Court has ever required.

The Third Circuit makes no attempt at justifying funeral directors' alleged conspiratorial conduct. Moreover, it makes no attempt to explain how a record that shows funeral directors meeting, dis-

cussing, running advertisements and imposing fees upon consumers, would not also show that these same funeral directors were motivated to achieve an anti-competitive purpose and could have acted independently of the other in achieving that purpose.

A. *The Third Circuit Failed To Analyze The Facts It Found "Undisputed" In Light Of Kodak And Its Illuminating Rule 56 Lessons*

This Court only last year amplified antitrust summary judgment standards in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992).

The Court in *Kodak* emphasized that each antitrust claim is to be resolved on a "case-by-case" basis and that each case's resolution is to be accomplished by "focusing on the 'particular facts disclosed by the record.'" *Id.* at 2082. The "economic reality of the market at issue" is to be examined closely. *Id.*

The "particular facts" that are "disclosed by the record" in this action were ignored by the Third Circuit. Facts in this record that are admittedly "undisputed", but ignored, establish that funeral directors met, engaged in anti-competitive discussions, ran anti-consumer "warnings" and "imposed" casket handling fees upon consumers. Such "particular" and incriminatory facts do under *Kodak* create clear inferences that funeral directors illegally conspired in violation of section 1. Certainly, the Third Circuit should have considered the "economic reality" of competitors meeting, of discussing and engaging in anti-competitive practices, and of the "reality" that such practices will severely injure if not destroy the market for competitive caskets.

The *Kodak* Court weighed the "risk" that "illegal behavior [will go] punished" against the "risk of deterring pro-competitive conduct." *Id.* at 2083. That funeral directors should not go "unpunished" must tip the scale since there is *no* risk that funeral directors anti-competitive behavior could possibly further any competition or possibly not damage the casket market. Consumers should not be denied pro-competitive sales of caskets by Petitioners and other third party casket sellers because of funeral directors' conduct. Just

as conduct that reduces prices is quintessential pro-competitive and favored under the antitrust laws, conduct that increases prices is "facially anti-competitive and exactly the harm that antitrust laws aim to prevent." *Id.* at 2088. Funeral directors increasing prices through their imposition of an extra fee would clearly be engaging in conduct that is "facially anti-competitive."

The Third Circuit failed under *Kodak* to analyze the "particular facts" that are "disclosed by the record" in this action, and neglected under *Continental Ore* to consider "undisputed" facts within the "whole picture." The Third Circuit's failure to apply *Kodak* constitutes grounds for this Court's vacation of the Third Circuit's opinion and for remand in light of *Kodak*. *See, Virtual Maintenance v. Prime Computer, Inc.*, 113 S.Ct. 314 (1992).

III.

THE RECORD CONTAINS SUFFICIENT FACTS FROM WHICH A JURY COULD INFER THAT EACH FUNERAL DIRECTOR HAS TIED ITS SALES OF FUNERAL SERVICES TO PURCHASES OF CASKETS, THAT EACH FUNERAL DIRECTOR POSSESSES SUFFICIENT MARKET POWER TO INJURE COMPETITION AND THAT EACH FUNERAL DIRECTOR VIOLATED SECTION 1 OF THE SHERMAN ACT.

A. *The Record Supports The Inference That Each Funeral Director Tied Purchases Of Caskets To Sales Of Burial Services*

The Third Circuit found no evidence from the record that funeral directors conditioned sales of burial services upon purchases of caskets. (A-4). It found no evidence because it again ignored "the whole picture" and because it totally disregarded obvious implications of facts it found "undisputed" from which a rational jury could infer tying arrangements in violation of the section 1 tying claim. *See, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

Certainly, each funeral director sells to consumers combined sales of burial services with purchases of caskets. Funeral directors use form contracts (A-4) and offer consumers "package deals" in that for "one price" consumers "receive funeral services, caskets and vaults." (A-18). Included within that "one price" might be a casket handling fee which funeral directors added to their price lists. (A-23). Since caskets are packaged with services, the Third Circuit analyzed whether such packaged sales actually required consumers to purchase caskets in order to purchase burial services.

The Third Circuit looked for evidence that casket purchases were expressly required in the funeral directors' "form contracts." (A-4). However, The Third Circuit could find no "written" evidence in these "form contracts" that casket purchases were expressly required. (A-4). But the law, which the Third Circuit neither cites nor analyzes, requires no such "express contractual provision" but only "a fair inference" of one. (A-4). *See, e.g., Unger v. Dunkin Donuts of America*, 531 F.2d 1211 (3rd Cir. 1976), *cert. denied*, 429 U.S. 823 (1976); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3rd Cir. 1977) *cert. denied*, 434 U.S. 1087 (1978); *Waldo v. North American Van Lines*, 102 F.R.D. 807, 814 (W.D. Pa. 1984).

Certainly, an express condition can be inferred from the admitted "package deals," from the "one price" charged consumers who "receive funeral services, caskets and vaults," from the "one price" that might include a casket handling fee, and from the casket prices listed on funeral directors' burial price lists. Moreover, the "undisputed facts" of the "whole picture" are that funeral directors discussed the "threat" and "problem" of caskets competitive sales, if not packaged with burial services. If funeral directors did not require consumers to also purchase caskets, then the copious meetings and the numerous discussions to decide "what to do about . . . [competitive casket sellers]," would have been pointless. Funeral directors did what they did because some consumers were escaping the requirement that they buy caskets exclusively from them.

Thus, funeral directors imposed casket handling fees, depending upon where consumers purchased caskets. Certainly, the "undisputed" facts that funeral directors met, discussed competitive casket sales and "imposed" casket handling fees (A-2), would support an

inference that the contractual package, along with the "imposed" fee, expressly conditioned the availability of burial services on the purchase of caskets and that each funeral director implementing tying arrangements violated section 1.

B. *The Record Supports The Inference That Consumers Were Coerced Into Purchasing Caskets*

Regarding "coercion," the Third Circuit could find none because it failed to analyze the challenged tying arrangement within the "economic reality of the market at issue." *See, Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2077, 2082 (1992).

According to the Third Circuit, the challenged tying arrangements could be avoided since "the consumer had an option to avoid the fee if he or she wishes to." (A-4). But this argument ignores the compelling counter-argument that funeral directors who "imposed" the fee may have controlled over 75% of all burial services conducted in Greene County. It simply is not "economic reality" to expect consumers to travel outside Greene County to avoid the fee, and the Third Circuit cites no authority that would support such severe consumer strategies in order to avoid the fee. Indeed, the funeral directors met and discussed strategies designed to keep consumers as customers for burial services while penalizing them and Petitioners for their casket transactions. The Third Circuit cites as persuasive on the issue of "coercion" a single 1982 decision of the Court of Appeals for the Second Circuit, *Shop & Save Foods Markets v. Pneumo Corp.*, 683 F.2d 27 (2nd Cir. 1982), which can easily be distinguished on its facts.

In *Shop & Save*, a retail grocery negotiated a lease with a corporation owning both rental property and a wholesale grocery distributor. Negotiations continued for months until they agreed to a leased rate that varied according to the amount of groceries the retailer purchased from the wholesaler. The retailer sued the corporation contending that it was forced to pay the corporation a "penalty" rent because it refused to purchase its supplies from the wholesaler. *Id.* at 29. The Second Circuit found that since the retailer was free to purchase groceries anywhere and because the corporation lacked "power or leverage in the tying market to deny his competi-

tors access to the tied market," an "attempt" to force a tie "which results only in an agreement to pay a higher price for the tying product" does not violate section 1. *Id.* at 31.

Clearly, *Shop & Save* is inapposite. First, funeral directors have licensed market power over burial services and can leverage that power to deny their casket competitors access to consumers searching for reduced price caskets. Funeral directors are licensed, they attended meetings, consulted each other, and devised anti-competitive methods whereby they used their power. Secondly, consumers cannot possibly dicker for months in arms length negotiations with funeral directors over prices for burial services and caskets. Funeral directors use price lists and they use form contracts, and such give and take negotiations are simply not possible. Lastly, casket handling fees are not simply part of "an agreement to pay a higher price for the tying product." Since burial service contracts include prepackaged caskets, consumers cannot realistically negotiate a lower burial price.

Upon comparing the lessor/lessee relationship in the competitive and unregulated grocery store market with the consumer/licensed funeral directors relationship in the regulated burial services market, the Third Circuit found no "coercion" as a matter of law. Obviously, a fee imposed upon consumers by licensed sellers in a regulated market would be far more "coercive" than one imposed upon grocery retailers in an unregulated, competitive market with its greater options and alternatives and with its open markets and low entry barriers. Whether a consumer searching a regulated market for licensed sellers determined to eliminate competitive casket alternatives was "coercive," was a question for the jury that the Third Circuit erroneously decided on its own.

C. *The Record Further Supports The Inference That Each Funeral Director Possessed Sufficient Market Power And That Each Harmed Competition*

The Third Circuit conceded that even if there were "coercion," there still are no facts establishing that each funeral director had market power sufficient to violate section 1 *per se* or that each

funeral director's alleged tying arrangement harmed competition such that section 1 was violated under a rule of reason standard.

Again, the Third Circuit takes a cramped, narrow view and ignores obvious "undisputed" facts which under *Kodak* would establish that each funeral director may, indeed, have possessed sufficient market power and which may have also established that competition's destruction was each funeral director's objective. The Third Circuit failed to analyze the record and the issues of law and fact raised under *Kodak*.

First, *Kodak* makes it clear that evidence of "market power" takes many forms, and can include "evidence of increased prices and excluded competition." *Kodak*, 112 S.Ct. at 2083. Of course, for a funeral director to impose a fee would be for the consumer to endure an increase in burial service prices. For a funeral director to have conspiratorially raised prices without regard to its impact on demand (or a concomitant loss in sales) would demonstrate market power and raise yet another issue for a jury's resolution.

Moreover, each funeral director who attended meetings, had anti-competitive discussions, issued "warnings," and imposed casket handling fees, did so for the express purpose that he wanted to exclude competition. Under *Kodak*, whether funeral directors had market power because prices were increased or because competition was excluded, are questions of fact for a jury's determination. Petitioners did not need to establish market power to "have engaged experts, performed market research, or looked for actual customers who wanted to switch funeral homes or buy a third-party casket." (A-6). The Third Circuit misreads *Kodak* and Petitioners should not be barred from raising these market power issues before a jury.

The Third Circuit may find it "obvious" that "neither funeral services nor caskets are unique, so that the market power that existed in Kodak is simply not present here," but their finding was made without regard to the licensing of funeral directors operating in a regulated burial service market. The facts show that they used their power over burial services to destroy competition in the unregulated casket market, and the Third Circuit ignored these facts and reached their erroneous market power conclusion without "focus-

ing on the 'particular facts disclosed by the record'" or upon the "economic reality of the market at issue." *Kodak*, 112 S.Ct. at 2082.

CONCLUSION

Facts supporting inferences of a *per se* illegal price fixing conspiracy and illegal tying arrangements in violation of section 1 of the Sherman Act should not be withheld from a jury. The allegedly conspiring funeral directors must, in this Court's recent words from *Kodak*, face a jury and possibly be "punished" for their unredeeming and anti-competitive conduct. The Third Circuit clearly breached Rule 56 standards established by this Court for review of antitrust claims and its manifest errors should be corrected. This Court should, it is respectfully requested, grant this petition in order to review the decision below and to correct several obvious injustices.

Dated: July 22, 1993

Respectfully submitted,

TARASI & JOHNSON, P.C.

By: Louis M. Tarasi Jr.

Louis M. Tarasi, Jr., Esquire
Attorney for Petitioners
Greene County Memorial Park,
Greene County Monument and
Vault Company

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3429

GREENE COUNTY MEMORIAL PARK, a corporation;
GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,

Appellants

v.

BERN FUNERAL HOMES, INC., a corporation;
FRANK J. BERN, an individual; FRANK C. "CHUCK" BERN, an individual; PEGGY BERN, an individual;
GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; DARRYL THROCKMORTEN, an individual.

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-00245)

District Judge: Hon. Maurice B. Cohill, Jr.

Argued February 25, 1993

Before: HUTCHINSON and NYGAARD,
Circuit Judges and
POLLAK, *District Judge**

APR 26 1993

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* Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM OPINION

NYGAARD, *Circuit Judge*

Plaintiffs Greene County Memorial Park and Greene County Monument and Vault Company appeal from the district court `a order granting summary judgment to the defendant funeral directors. We will affirm.

I.

The facts and procedure of this case have been adequately set forth in the published opinion of the district court. See Greene County Memorial Park v. Behm Funeral Homes. Inc., 797 F. Supp. 1276 (W.D. Pa. 1992). For our purposes, it suffices to say that this is an antitrust case between a cemetery and a group of funeral directors. In recent years, funeral directors have come under competition from third-party sellers of caskets and burial vaults such as the appellants here. These sellers underprice the funeral director's charges for this type of funeral merchandise, thus depriving the funeral directors of substantial profits.

In response to this perceived threat, it is undisputed that the funeral directors, through their trade associations, met and discussed the problem of third-party sales and what to do about them. It is also undisputed that they ran a series of advertisements warning the public of the "dangers" of buying funeral merchandise from these sellers and imposed a "casket handling fee" for caskets not purchased from the funeral director. These fees, however, were imposed by individual funeral directors at different times and in varying amounts.

Plaintiffs sued under section 1 of the Sherman Act, section 14 of the Clayton Act, as well as under state law for tortious interference with contractual relations. After the conclusion of discovery and cross-motions for summary judgment, the district court denied summary judgment for plaintiff, granted it for defendants on the antitrust counts and dismissed the remaining state law claim. On appeal, plaintiffs raise issues only under section 1 of the Sherman

Act. Specifically, they assert: 1. The evidence raises a genuine issue of fact as to the existence of a tying arrangement; 2. The evidence of record supports inferences of conspiracy and a group boycott against plaintiffs; 3. Plaintiffs were not given fair notice of the grounds for summary judgment. "All of these contentions are meritless and will be discussed in turn.

II.

If there were evidence supporting the inference that the funeral directors conspired to fix prices by adopting a uniform casket handling fee as a means of defeating competition, then a *per se* violation of the Sherman Act occurred and plaintiffs would be entitled to a trial. Unfortunately for plaintiffs, the record shows that not all of the defendants even imposed a handling fee. Those that did adopted these fees at various times, and before plaintiff began selling caskets. Moreover, the fees varied widely between funeral homes, ranging from $200-$425, and there is no evidence that price information was shared between funeral directors at association meetings. On this record, a rational jury could not infer a concerted effort to fix prices. *See Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986) (if defendants' conduct consistent with both permissible and anticompetitive motives, such conduct standing alone does not avoid a judgment without evidence tending to exclude the possibility that defendants acted independently); *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct 1464, 1470-71 (1984) (warning against permitting juries to draw inferences from highly ambiguous evidence). In order to make out a non-tying Sherman Act violation, concerted activity must be proved. *See. e.g., Fraggale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985).

Plaintiffs therefore allege that the casket handling fees were an attempt to condition the sale of funeral services (the tying product) on the purchase of caskets from the funeral directors (the tied product). If this happened, there is no need for concerted activity; however, three elements must be proved: the existence of a tie, sufficient market power by the defendant over the tying product, and a

"not insubstantial" effect on interstate commerce.[1] *See, e.g.. Ungar v. Dunkin Donuts,* 531 F.2d 1211, 1223-24 (3d Cir. 1976). Tying arrangements can be found illegal either *per se* or, if insufficient market power exists, under a rule of reason analysis.

One way to prove a tie is to show an express contractual provision or a fair inference from one. Thus, if it were written into a funeral director's form contract that services would *only* be provided if the casket were purchased from that funeral director, an express tie would be made out. It would also be sufficient if plaintiff could show that a customer was threatened with or actually refused funeral services if he or she did not purchase the casket from the funeral director. Unfortunately for plaintiffs, there is no evidence in this case that either practice occurred. Customers were permitted to buy caskets elsewhere, although a fee was charged. No one was ever refused services because they bought a casket from a third party.

Another way to prove a tying arrangement is to produce evidence of actual coercion; that is, the handling fee causes caskets to be purchased from the funeral directors when they otherwise would not be. The mere fact that the buyer actually buys both products from the same seller is insufficient. See Ungar, 531 F.2d at 1224-25. And one court has held that an additional fee imposed when a grocery store lessee purchased his inventory from a third party rather than the lessor, without actual evidence of coercion, was insufficient for liability *Shop & Save Food Markets v. Pneumo Corp.*, 683 F.2d 27, 30 (2d Cir. 1982). Here, there is no evidence that any consumer was ever coerced into buying a casket from one of the defendant funeral homes, nor was any marketing survey put before the district court. Although this fact alone is fatal to plaintiffs' burden of showing coercion, it also appears from the record that at least one defendant does not even charge a casket handling fee.[2] Thus, the consumer has an option to avoid the fee if he or she

1. The commerce requirement is not disputed here, as funeral merchandise travels in interstate commerce.

2. In addition, the record indicates that there are other funeral homes in the relevant market area which were not joined as defendants in this case. It is not evident whether these funeral homes charge a casket handling fee.

wishes to. On this record, we cannot find sufficient evidence of coercion to create a genuine issue of material fact for trial.

Even if we were to find a genuine factual dispute on the coercion issue, there is no evidence of record indicating that any defendant possesses sufficient market power to be liable for a *per se* tying arrangement. In the district court, plaintiffs introduced a questionable market survey based on the number of funerals conducted by defendants divided by the total deaths in Greene County. Based on this survey, they estimated that defendant Behm had a market share of 33-43%, Lesako 14-17%, and Milliken 23-28%. No figures were presented for Greenlee.

Taking these figures as true, no *individual* funeral director[3] has sufficient market power to be guilty of a *per se* Sherman Act violation. For example, in *Times-Picayune Publishing Co. v. United States*, 73 S.Ct. 872, 881 (1953), a market share of 33-40% was held to be insufficient. *See also Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S.Ct. 1551, 1566 (1984) (30% market share insufficient).

Now, on appeal, plaintiffs have apparently abandoned their theory that the relevant market is the market for funeral services in Greene County. Rather, they assert that the relevant market is the market over caskets' once a particular funeral director has been selected. In other words, because of the high economic and emotional switching costs of changing funeral homes once the body has been delivered, and the costs imposed by the casket handling fee if the customer "stays" with that home, the market power of a funeral director in his own home is 100% If we accept this new theory, plaintiffs assert that the case comes within the recent Supreme Court decision in *Eastman Kodak Co. v. Image Technical Services*, 112 S.Ct. 2072 (1992). There are three problems with this argument.

The first problem is procedural. *Kodak* was decided on June 8, 1992, a whole month before the district court's decision on July 7. Nevertheless, plaintiffs did not file a supplemental brief citing this

3. Absent concerted activity, it is individual funeral director's market power that is at issue, not the market power of all defendants as a group.

case, nor did they seek to amend their complaint to bring in this new definition of market power, nor did they file a motion for reconsideration before bringing this appeal. We are troubled that plaintiffs would have us decide their case based on a legal issue that they failed to present to the district court in the first instance. Nevertheless, we will assume, without deciding, that plaintiffs are not procedurally barred by this default.

More damaging is the fact that, unlike in *Kodak*, plaintiffs never even developed the facts necessary to support this argument while the case was still in the district court. They could have engaged experts, performed market research, or looked for actual customers who wanted to switch funeral homes or buy a third-party casket, in an effort to prove that a funeral director dominates the market once he or she has been selected. Plaintiffs did none of these things. Now, on appeal, they ask us to reverse the district court's grant of summary judgment on a question they never gave the district court a chance to decide. We conclude they are barred from doing this. *See Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975).

Second, even if appellants could raise this issue now, the relevant market in a tying claim is never the tied product market (caskets), but rather the tying product market (funeral services). *See Town Sound and Custom Tops v. Chrysler Motors Corp.*, 959 F.2d 468, 479 (3d Cir. 1992). Thus, it is quite irrelevant whether the defendants have market power over caskets once they are selected.

Finally, even if *Kodak* could be raised, it is inapposite. In that case, Eastman Kodak was a seller of copiers and servicing for copiers. It controlled the vast majority of the market for servicing of its own copiers and virtually the entire market for replacement parts. To further control the servicing market, Kodak implemented a policy of selling parts to third parties only if they agreed not to buy servicing from independent service organizations and pressured its Oil suppliers not to sell parts to third-party servicers. Those servicers sued.

Kodak's argument was that its market share of the new copier business was too Ball for *per se* antitrust liability.

Nevertheless, the Supreme Court held that *once someone bought a Kodak copier,* Kodak had a virtual monopoly on the parts market for that machine, since another vendor's part could not be substituted at that point. Thus, the parts market, not the new copier market, was the proper focus of the antitrust inquiry.

Plaintiffs here make a similar argument: once the funeral director has been chosen and the body delivered to his home, that funeral director has a lock on the market for caskets. However, *Kodak* is clearly distinguishable from the instant case. If someone buys a Kodak copier and Kodak controls the market for parts *because the parts are unique,* he or she cannot go and buy a Xerox part, nor can that person hire a service company other than Kodak unless Kodak will sell parts to it. But if a funeral customer selects the Behm funeral home and decides he wants to buy a casket from somebody else, he can either pay the Behm handling fee or he can move the body to a home that does not charge a fee. Obviously, neither funeral services nor caskets are unique, so the market power that existed in Kodak is simply not present here.

The above discussion of market power demonstrates why defendants cannot be liable under a *per se* theory. Nevertheless, even if market power is lacking, plaintiffs could conceivably prevail under a rule of reason analysis. *Town Sound,* 959 F.2d at 482. However, to succeed on a rule of reason analysis, plaintiffs must show some injury to competition resulting from the defendant' s activities, not just injury to the plaintiff itself. Id. at 486. Unfortunately, plaintiff has chosen to stand on one single piece of evidence: the affidavit of Challen Waychoff, the former owner of Greene County Memorial Park. In that affidavit, Mr. Waychoff states only that the funeral directors have hurt his business. Under *Town Sound,* that is insufficient evidence of injury to competition.

III.

Plaintiffs make a number of allegations that the funeral directors engaged in a concerted effort to drive them out of business through a group boycott and other practices. None of them have any merit, even granting plaintiffs all the inferences in their favor.

If the funeral directors engaged in concerted action to cease doing business with Greene County Memorial Park, there would be a *per se* violation of the Sherman Act. *See Klor's, Inc. v. Broadway Hale Stores*, 79 S.Ct. 705, 709 (1959). Unfortunately for plaintiff, the record supports only the conclusion that the defendant funeral directors buried people at the Park and provided funerals to persons who had purchased caskets from the Park at all relevant times. There is no evidence that the directors agreed that the Park should be boycotted. There is some evidence that a single director stopped buying burial vaults from the park after the Park started selling caskets, but *individual* action does not make out a group boycott.

Appellants also make much of certain advertisements placed by the funeral directors. These advertisements warned about people selling caskets door-to-door and instructed the reader to contact his or her local funeral director for more information. The advertisements were truthful, although the district court characterized them as "arguably misleading." There is no dispute that the directors acted in concert to place these advertisements.

The district court analyzed these advertisements under the rule of reason, since they did not fall into that class of practices warranting a *per se* analysis.[4] The court then granted summary judgment because, as with the tying arrangement, plaintiff produced no evidence that the market rather than the plaintiffs was harmed by the advertisements. This was correct. There is simply no evidence that these advertisements, which were directed at the activities of certain door-to-door salesman and not those of the plaintiffs, injured competition.

IV.

Appellants assert two procedural arguments which they believe require reversal: first, that summary judgment was granted even though & motion to compel discovery was outstanding, and sec-

4. Although the district cited no authority, we believe it was correct that a rule of reason analysis applies. Per se analysis is reserved for those practices which are so anticompetitive as to lack any redeeming virtue, e.g., price fixing, division of markets and tying arrangements. *See N. Pac. R. Co. v. United States*, 78 S.Ct. 514, 518 (1958). These advertisements, although perhaps lacking complete purity, were truthful and were not bereft of all redeeming value.

ond, that the district court somehow went beyond the scope of the defendant's summary judgment motion and decided issues not properly before it. We disagree.

As to the first contention, the district court did grant summary judgment even though plaintiff was still attempting to discover defendant Greenlee's price list. Evidently, the purpose of this discovery was to find out if he charged a casket handling fee. However, at his deposition, Greenlee stated that he never imposed a handling fee. And even if he had, that fact would not change the legal conclusion that coercion and market share, both necessary elements of a *per se* tying claim, are lacking.

Regarding the second contention, we have examined the defendant's summary judgment brief. It raises all the points decided by the district court. We simply can find no basis for appellant's assertion of error.

V.

Because the district court correctly granted summary judgement in favor of defendants, we will affirm. Costs taxed against appellant.

TO THE CLERK:
Please file the foregoing memorandum opinion.

/s/
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,	)	
Plaintiffs,	)	CIVIL ACTION NO. 88-245
v.	)	
BEHM FUNERAL HOMES, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, individual; SAMUEL A. MILLIKEN, an individual; and DARRYL THROCKMORTEN, an individual,	)	
Defendants.	)	

OPINION

COHILL, D.J.

This case involves allegations of unlawful tying arrangements and boycotts under the Sherman and Clayton Anti-trust Acts, 15 U.S.C. sections 1 and 14 respectively, and tortious interference with contractual relations under Pennsylvania law. Before this Court are cross motions for summary judgement filed by the plaintiffs and jointly by all the defendants; a separate Motion for Summary Judgment was also filed by Peggy Behm.

For the following reasons, we will deny the plaintiffs' summary judgment motion, and grant the defendants' summary judgment

motion. We will also grant defendant Peggy Behm's separate motion for summary judgment. All motions not addressed by this Opinion are moot.

I. FACTS

The plaintiffs in this action are Greene County Memorial Park (the "Park"), a Pennsylvania corporation which owns and operates a cemetery in Greene County, Pennsylvania, and Greene County Monument and Vault Company (the "Vault Company"), a Pennsylvania corporation engaged in the business of selling burial vaults and grave markers. The Park and Vault Company were, at all times relevant to this opinion, owned and operated by Jeanne and Challen Waychoff.

Defendant Behm Funeral Home, Inc. is owned and operated by defendants Frank J. Behm, Frank C. Behm and Gregory Rohanna – all funeral directors licensed by the Commonwealth of Pennsylvania. Defendant Peggy Behm is an employee of, and stockholder in, Behm Funeral Home and is married to Frank J. Behm. Defendants Gordon and Barrett Greenlee are licensed funeral directors who own and operate Greenlee Funeral Homes, a partnership. Defendants Samuel Milliken and Darryl Throckmorton are licensed funeral directors who own and operate Milliken & Throckmorton Funeral Home, also a partnership. Defendant Paul Lesako is a licensed funeral director and does business as Paul M. Lesako Funeral Homes. The defendants' businesses are all located in Greene County, in the Western District of Pennsylvania. For the purposes of this Opinion, we will refer to Frank J. Behm, Frank C. Behm, Gregory Rohanna, Samuel Milliken, Darryl Throckmorton, Paul Lesako,' and the Greenlees collectively as the "Funeral Directors."

The Park has sold burial plots and grave markers since 1930. C. Waychoff deposition at 23-24, 449. In 1984 it began selling burial vaults and mausoleum crypts as well. *Id.* at 13; Plaintiff's Response to Behm's First Set of Interrogatories No.9. In October, 1986, the Park began selling a product which served as both a casket and a vault called "Chapel Vault," and in October, 1987, the Park began

selling caskets. Plaintiff's Response to Behm's First Set of Interrogatories Nos. 1,6,9.

The Vault Company was incorporated in October, 1984 to sell monuments and to purchase vaults for resale to the Park. *Id.*; C.Waychoff Dep. at 437,440. The Vault Company eventually stopped selling vaults to the Park when the Park began to buy directly from vault manufacturers. J. Waychoff Dep. at 17-18, 20-21.

In addition to providing funeral services, the Funeral Directors also sell caskets, vaults and monuments. They belong to several professional organizations including the Pennsylvania Funeral Directors Association ("PFDA") and the Green County Funeral Directors Association ("GCFDA"). It was during meetings of these organizations that the plaintiffs claim the defendants conspired to adopt the various illegal, anti-competitive practices and policies listed below in an effort to eliminate the Park as a competitor in the sale of caskets and burial vaults. These actions, the plaintiffs allege, are in violation of the Sherman and Clayton antitrust laws.

I. Advertisements

During two meetings of the GCFDA in 1986 and 1987, several members, including the Funeral Directors, agreed to publish certain advertisements in local newspapers. One, which was published by defendants Samuel Milliken, Darryl Throckmorton, Frank J. Behm, Frank C. Behm and Gregory Rohanna, was entitled "Care Concern and Compassion." Although the content of these advertisements varied slightly, they all warned consumers of "out-of-town salespersons" selling vaults and caskets. According to Frank J. Behm, the advertisements were directed at Tri-County Funeral Association, a company from Allegheny County, Pennsylvania, which sold vaults and caskets by door-to-door salesmen in Allegheny, Greene, Washington and Fayette counties. F.J. Behm Dep. at 74,75,79-83; *see also* G.Greenlee Dep. at 28,29. The advertisements placed by Frank J. Behm, Frank C. Behm and Gregory Rohanna included the following statement:

> Before you open your phone line or your door to one of these salespeople, call your local funeral director

> for background information. If you choose to speak with a salesperson, we urge you to use caution. They are only offering to sell you a casket and a vault for future use. This package does not include your funeral services. They may use a "special savings certificate" as an enticement. We urge you to contact your funeral director and Social Security office to discuss this certificate. The salesperson will probably tell you that the casket and the vault that they are selling today will gladly be accepted by any funeral director in the future. This is not so! They will finally tell you that they can save you thousands of dollars when you deal through them. This is absolutely untrue!

Exhibit 1 to F.J. Behm Dep; Exhibit 24 to Defendants' Motion for Summary Judgment.

Other advertisements sponsored by the Funeral Directors and the GCFDA warned consumers to consult funeral directors before making purchases from salespeople. *See* e.g. Exhibit 19 to Defendants' Summary Judgment Motion.

Challen Waychoff testified at his deposition that none of these advertisements contained false statements of fact, disparaged the plaintiffs or their products, or caused any of the plaintiffs' customers to cancel contracts. C. Waychoff Dep. at 509.

2. Statements to Plaintiffs

The plaintiffs also allege that the defendants made various statements to them which evidence the defendants' conspiracy to drive the Park out of business. They allege that defendant Gordon Greenlee stated to Challen Waychoff in February, 1984, that the funeral directors had always fought among each other and now that Challen Waychoff was competing against them by selling caskets, they were going to have to get together to see what they could do about the Waychoffs. C. Waychoff Dep. at 264. Then, in July, 1986, defendant Paul Lesako told Jeanne Waychoff that he was going to stop purchasing vaults from the Park because he heard at a meeting

of the GCFDA that Park was selling caskets. C. Waychoff Dep. at 266; Complaint ¶¶ 17-22.

3. Casket Handling Fees and Price Fixing

It is undisputed that some of the funeral directors impose on customers who purchase caskets from others so called "casket handling fees." The plaintiffs contend that these casket handling fees are designed to thwart competition and allow the defendants to recover profits lost when customers purchase caskets elsewhere. Plaintiffs' Brief in Support of Summary Judgment at 5. The plaintiffs claim that the defendants practice of charging a casket handling fee constitutes an illegal tying arrangement, intended to drive third party casket sellers out of business.

The defendants contend that casket handling fees are designed to recover the costs which funeral directors incur when handling caskets purchased from third party vendors and are condoned by the Federal Trade Commission. *See*, FTC Opinion letter dated 3/10/88, Exhibit 21 to Defendant's Motion for Summary Judgment. In addition the Park imposed its own casket handling fees when customers purchased caskets and vaults from others. Defendants' Brief in Support of Summary Judgment at 12,13.

The plaintiffs respond that the FTC allows only reasonable casket handling fees, and that it is clear from the FTC letter to which the defendants refer that any action taken to discourage or halt third party sales of caskets is a violation of FTC regulations. Plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment at 25.

The plaintiffs also allege that at meetings of the GCFDA and the PFDA the defendants exchanged pricing information in furtherance of a conspiracy to fix prices for funeral services and products. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 16-19. In support of this contention, the plaintiffs offer evidence that the PFDA circulated an anonymous pricing survey among its members in 1989 (to which only one of the defendants responded), and evidence that Frank J. Behm gave talks at PFDA meetings concerning "proper pricing" of funeral ser-

vices to recover costs incurred when handling third party caskets. *Id.;* Plaintiffs' Brief in Support of Summary Judgment at 15-19; F.J. Behm Dep. Ex. 18.

4. Attempts to Hire Away the Park's Employees and Interfere with the Park's Contracts

In furtherance of the defendants' scheme to drive the Park out of business, the plaintiffs allege that defendants Frank J. Behm, Frank C. Behm and Paul Lesako attempted to hire employees away from the Park and interfere with its contracts with customers. Complaint ¶¶ 23,25. Although the plaintiffs fail to direct the Court to specific evidence in support of these allegations, we found that the Waychoffs testified during oral deposition that an associate of Paul Lesako's named Mr. Martin told a Park employee named Eli Granus that he would starve to death working for Challen Waychoff and asked him how he made a living. C. Waychoff Dep. at 326. The Waychoffs also testified that Mr. Milliken and Mr. Throckmorton asked another employee of the Park why he would work there. *Id.;* J. Waychoff Dep. at 151. This is the only evidence the Court has discovered relating to the plaintiffs' allegations that as part of their conspiracy to drive the Park out of business, the defendants attempted to hire away the Park's employees.

As with their allegations that the defendants attempted to hire away their employees, the plaintiffs fail to direct the Court to evidence in support of their allegations that the defendants interfered with the Park's contractual relations with its customers. Again the Court has identified through its independent review of deposition testimony five instances where the plaintiffs allege that the defendants interfered with the Park's contracts with its customers for the sale of caskets or vaults. *See* C. Waychoff Dep. at 274-75, 326-27; J. Waychoff Dep. at 206. The Waychoffs allege that several customers who planned on purchasing vaults or caskets from the Park changed their minds after talking to the Funeral Directors. The plaintiffs offer no evidence concerning the reasons these customers changed their plans after talking with defendants or what the defendants said to them.

The plaintiffs allege that the defendants' conduct outlined above constitutes a conspiracy to drive the Park and other third party casket sellers out of business by interfering with the Park's current and prospective contractual relations, attempting to hire away its employees, fixing prices, tying the sale of their funeral services to the sale of their caskets and vaults, and by placing group advertisements attacking third party casket sellers. The plaintiffs suggest that these activities are proscribed by section 3 of the Clayton Antitrust Act and section l of the Sherman Antitrust Act. 15 U.S.C. §§ 14, l. After outlining the standard we must apply in evaluating summary judgment motions we will address the merits of the plaintiffs' motion for partial summary judgment and then discuss the defendants' motions.

II. SUMMARY JUDGEMENT STANDARD

Federal Rule of Civil Procedure 56(c) states that summary judgment shall be granted forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

When confronted with a motion for summary judgment, it is not the court' s function to weigh the evidence and determine the truth of the matter, rather, it is the court's job to decide whether there is a genuine issue for trial. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

The moving party has the burden to identify those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party then must go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. As the Supreme Court stated in *Celotex Corp. v. Catrett:*

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23.

The United States Supreme Court has cautioned courts to tread carefully when granting summary judgment motions where motive and intent are important issues. In those cases, summary judgment should be granted only in the absence of any significant probative evidence tending to support the complaint. *Poller v. Columbia Broadcasting System. Inc.*, 368 U.S. 464 (1962); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). Against this standard we evaluate the parties' summary judgment motions.

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs state that they are entitled to partial summary judgment against the Behm Defendants, Paul Lesako, Samuel Milliken and Darryl Throckmorton on their claims under section 1 and 3 of the Sherman and Clayton Acts respectively because these defendants have admitted discussing at meetings of the GCFDA and PFDA third party caskets sales, as well as the possibility of purchasing the Park. Plaintiffs' Brief in Support of Summary Judgment at 10,11,14-16. They have also admitted, the plaintiffs argue, such "anti-third party activities" as price fixing and group advertisements criticizing third party casket sellers and intended to drive the plaintiffs out of business. *Id.*

In further support of their summary judgment motion the plaintiffs argue that the defendants' casket handling fees "effectively penalized

and coerced customers, boycotted prospective customers by deterring purchases from Plaintiffs and blocked Plaintiffs from access to casket and vault sales." Plaintiffs' Brief in Support of Summary Judgment at 17. The 1989 PFDA pricing survey reveals that over three hundred of its members used a casket handling fee "to recover profits lost to third party casket and vault sales," and that for most members this fee was more than $250.00. Plaintiff's Brief in Support of Summary Judgment at 17,18.

The plaintiffs also argue that Frank J. Behm's counsel has admitted in her pretrial statement that her client has violated sections 1 and 3. Plaintiff's Brief in Support of Summary Judgment at 22-23. We find no such admission. Such exaggerations and inaccurate interpretations throughout the plaintiffs' various briefs have forced the Court to scrutinize with unusual care all of the plaintiffs' representations.

In conclusion, plaintiffs argue that they are entitled to summary judgment on their tying claims against the Behm Defendants, Paul Lesako, Samuel Milliken and Darryl Throckmorton because they "admit in their depositions to instituting tied casket and services sales, to establishing a coercive penalty against consumers and to boycotting consumers from casket and vault purchases and Plaintiffs from casket and vault sales through the tying agreements." We do not think so.

The evidence shows only that some of the defendant Funeral Directors imposed casket handling fees when customers purchased caskets or vaults from others, and offered package deals whereby customers could receive funeral services, caskets and vaults all for one price. There is no evidence that the Funeral Directors forced customers into purchasing caskets and vaults from them by refusing to provide funeral services otherwise. There is also insufficient evidence that the casket handling fees were designed to deter competition rather than to cover increased costs incurred when handling caskets purchased elsewhere, as permitted by the FTC. We will therefore deny the plaintiffs' summary judgment motion.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants have jointly filed a summary judgment motion which attacks the plaintiffs' claims on several fronts. The moving defendants argue that: (1) the plaintiffs' claims under section 3 of the Clayton Act are unfounded because that statute does not apply to situations where goods are tied to services; (2) the plaintiff's claims of unlawful tying fail to state a cause of action; (3) the plaintiffs' allegations of concerted efforts in violation of the Sherman Act are unsupported by the evidence, and; (4) if the Court dismisses the plaintiffs' federal claims, it should dismiss the remaining state law claims for lack of jurisdiction. In addition, defendant Peggy Behm has filed a separate summary judgment motion arguing the plaintiffs have failed to present any evidence which suggests that she participated in any of the illegal acts alleged, and therefore the Court should enter summary judgment against the plaintiffs' claims against her. We will address these arguments serially.

A. *Claims Under Section 3 of the Clayton Act*

Section 3 of the Clayton Act states in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, . . . on the condition, agreement, or understanding that the lessee or producer thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller,

15 U.S.C. §14

Courts have clearly and consistently held that transactions involving the sale of services are outside the scope of section 3 of the Clayton Act. *See, Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F.2d 761 (3d Cir. 1934), *cert denied*, 293 U.S. 626 (1935); *Rosenbrough Monument Co. v. Memorial Park Cemetery Assn*, 666 F.2d 1130, 1141 (8th Cir. 1981), *cert denied*,

457 U.S. 1111 (1982); *Skepton v. Bucks County, Pa.*, 613 F.Supp. 1013, 1018 (E.D.Pa. 1985). The plaintiff does not contest the defendants' assertion that section 1 of the Clayton Act does not apply to goods tied with services, but alleges, in a footnote, that: "embalming fluid is a product. It is sold in the course of embalming services that funeral directors render. Thus judgment on the §3 claim for plaintiffs is appropriate." Plaintiffs' Brief in Response to Defendants' Motion for Summary Judgment at 27, n.8. This argument is frivolous.

Services are not "goods" simply because they involve the incidental use of a product, such as embalming fluid. We will therefore dismiss plaintiffs' section 3 claims.

B. *Claims Under Section 1 of the Sherman Act*

Section 1 of the Sherman Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . .

15 U.S.C. §1 (Supp. 1991).

In order to sustain a cause of action under section 1 of the Sherman Act, the plaintiffs must prove: (1) that the defendants contracted, combined or conspired; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy . . . . *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

The United States Supreme Court has held that concerted refusals to deal are generally per se violations of section 1. Business and economic justifications for such conduct are irrelevant, and a showing of adverse effect on competition is unnecessary. Kintner, *Federal Antitrust Law* §10.30 at 168; *see generally, United States v.*

Socony-Vacuum Oil Co., 310 U.S. 150, 210-19 (1940); *Fashion Organizers' Guild v. FTC*, 312 U.S. 457 (1941); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) ("Klor's Inc."); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) ("Radiant Burners").

When the defendants' activities do not constitute per se violations of section 1, the plaintiff must prove, through the rule of reason analysis announced by the Supreme Court in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), that the defendants' conduct is an unreasonable restraint on trade; a task which involves close examination of the particular facts of each case to determine the motives of the parties, the economic impact of the restriction, and its effect on the relevant market. Kintner, *Federal Antitrust Law* §10.37.

1. Plaintiffs' Tying Claims

When an individual holding market power over one product "ties" the sale of that product to another, which in effect forces buyers into purchasing the tied product from one source and thereby restrains competition in the market for the tied product, a violation of section 1 of the Sherman Act has occurred. Certain types of tying arrangements are considered per se violations of section 1 of the Sherman Act under the rule announced by the United States Supreme Court in *International Salt Co. v. United States*, 332 U.S. 392, 396-92 (1947), and refined by later case law. Under the modern rule, a plaintiff attempting to establish a per se violation of section 1 of the Sherman Act when a tying claim is involved must show that: (1) the defendant has tied the sale of two distinct products by conditioning the sale of the tied product to the purchase of the tying product; (2) a substantial amount of commerce is involved, and; (3) the seller has sufficient market power with respect to the tying product to appreciably restrain free competition in the market for the tied product. *See, Waldo v. North American Van Lines, Inc.*, 102 F.R.D. 807, 812 (W.D.Pa. 1984); *Waldo v. North American Van Lines, Inc.*, 669 F.Supp. 722, 727 (W.D.Pa. 1987); *see also, Ungar v. Dunkin Donuts of America, Inc.*, 531 F.2d 1211, 1223-24 (3d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

If a restraint on trade does not fall within the per se rule, a plaintiff may still establish a violation of section 1 of the Sherman Act under the rule of reason approach. "A rule of reason analysis requires the court to focus on 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.'" *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 615 (1953).

The plaintiffs allege that the Funeral Directors have "tied" their funeral services to the sale of caskets and vaults and that non-funeral directors selling caskets and vaults in Greene County are adversely affected by the defendants' practice of forcing consumers to "purchase a bundled package or locate a funeral director who sells products and services separately." Brief in Support of Plaintiffs' Summary Judgment Motion p.5. Such a search will prove futile, the plaintiffs argue, because almost all Greene County and Pennsylvania funeral directors belong to the PFDA, or other local trade associations such as the GCFDA, and have worked to destroy or diminish third party competition. *Id.*

We will address the plaintiffs' contention that the defendants' casket handling fees constitute a per se violation of section 1 of the Sherman Antitrust Act and then discuss the possibility that they violate the Act under the rule of reason analysis.

a. Per Se Analysis

The defendants contend that after extensive discovery the plaintiffs have failed to uncover any evidence of a per se illegal tying arrangement between the sale of funeral services and the sale of vaults and caskets. They argue the plaintiffs have presented no evidence of an express tying agreement between the defendants and their customers, and no evidence that the defendants' customers were coerced into purchasing vaults and caskets from the defendants. The plaintiffs respond that a per se illegal tying arrangement is evident in this case because "the tying policy is expressly written into the defendants' price lists." Plaintiff's Response to Defendant's Summary Judgment Motion at 26.

Although the plaintiffs allege that the defendants' funeral services were tied to the sale of caskets *and vaults* through the imposition of casket handling fees, they have offered no explanation or evidence that supports their allegations that the defendants also tied the provision of funeral services to the sale of burial vaults. On this basis we will grant summary judgment in favor of the defendants with regard to the plaintiffs' allegations that the defendants tied their funeral services to the sale of burial vaults. With that out of the way, we turn to the plaintiffs' allegation that the undisputed existence of casket handling fees proves the existence of a per se illegal tying arrangement between funeral services and *caskets*.

The Court finds that although some of the Funeral Directors listed casket handling fees on their price lists, there is no evidence that they expressly conditioned the provision of funeral services on the purchase of caskets. Nevertheless, the plaintiff's argue that there still exists a genuine issue of material fact as to whether the Funeral Directors use of casket handling fees constitutes a per se illegal tying arrangement.

In order to avoid summary judgment, the plaintiffs must present some evidence that a sufficient number of funeral directors in Greene County, in a concerted effort to eliminate competition from third party casket sellers, imposed casket handling fees to discourage customers from buying caskets elsewhere. If the plaintiffs fail to provide evidence that the defendants established casket handling fees as a *concerted* effort, they could still prevail on their tying claims if they could show that the defendants individually controlled a significant portion of the relevant market. We do not believe they have done either.

The plaintiffs argue that a genuine issue of material fact exists as to whether the defendants imposed casket handling fees as a concerted action. In support of this assertion, the plaintiffs refer the Court to pages ten through seventeen of their Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment. In this section, the plaintiffs attempt to outline the involvement of defendants Frank J. Behm, Frank C. Behm, Gregory Rohanna, Gordon Greenlee, Barrett Greenlee, Paul Lesako and Samuel A. Milliken in the alleged conspiracy by citing excepts of their deposition tran-

scripts. After referring to the testimony to which the plaintiffs cite, however, we find that the plaintiffs' summary of the defendants' testimony is not accurate. The deposition testimony cited by the plaintiffs reveals only that defendants Frank J. Behm, Frank C. Behm, Gregory Rohanna, Gordon Greenlee, Barrett Greenlee, Paul Lesako and Samuel A. Milliken attended meetings of the GCFDA and PFDA where they discussed: third party casket sales and their impact on the funeral director's business; advertising aimed at recovering sales lost to third party casket and vault salesmen; methods to effectively compete with third party casket sellers, and; the possible purchase of the Park. *See*, Exhibits 2-4, 8-10, 13, 16 to Plaintiffs' Motion for Partial Summary Judgment. Evidence that the Funeral Directors were members of various organizations which held meetings where pricing and competitors were discussed, is not sufficient evidence of a "conspiracy to impose casket handling fees aimed at destroying competition" to avoid summary judgment. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court stated that in such cases:

> [I]f the antitrust defendant's conduct is consistent both with permissible competition and illegal conspiracy, evidence of such conduct 'does not, standing alone, support an inference of antitrust conspiracy.' In such a situation, '[t]o survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of [section 1 of the Sherman Act] must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.' In other words, such a plaintiff 'must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff].

Matsushita, 475 U.S. at 553.

Rather than establishing concerted action to impose casket handling fees, the evidence presented by both sides tends to support the defendants' assertions that they acted independently when deciding whether to impose casket handling fees on their customers and if so, deciding how much to charge. The evidence reveals that the defen-

dants who impose casket handling fees adopted them at different times and charged varying amounts. Defendants Milliken and Throckmorton testified in their depositions that they instituted their casket handling fees in 1984. Milliken Dep. p.47. Behm Funeral Home adopted casket handling fees prior to 1984, and defendant Lesako did not adopt a casket handling fee until 1987. F.J. Behm Dep. pp. 89-90; Lesako Dep. p.64. The Greenlees have never used casket handling fees. B. Greenlee Dep. pp.40, 44. In addition, defendants Rohanna, Milliken and Lesako all testified in their depositions that prior to the initiation of this lawsuit they were unaware of the varied amounts each funeral director charged for casket handling fees. Rohanna Dep. p.25; Milliken Dep. p.39; Lesako Dep. p.22. The plaintiff has offered no other evidence that the defendants adopted and imposed casket handling fees as a concerted action.

Because we have determined that there is no evidence of concerted action to impose casket handling fees, the plaintiff must show that each defendant possessed sufficient independent market power under the per se analysis to avoid summary judgment on their tying claims.

The plaintiffs have compiled statistical data in an effort to define the Funeral Directors' market share in Greene County, Pennsylvania. The plaintiffs determined the total number of deaths reported in Greene County and divided that number by the number of funerals handled by the Behm, Lesako and Milliken and Throckmorton funeral homes. *See*, Affidavit of Jean Kell. Assuming this method of determining market share is accurate, and we do not believe it is because it is based upon total deaths occurring in Greene County rather than the total number of funerals held in Greene County, the plaintiffs have shown the defendants held the following share of the funeral market in Greene County from 1984 through 1990:

Funeral Home	Years	Market Share
Behm Funeral Home	1984-1990	33-43%
Lesako Funeral home	1984-1990	14-17%
Milliken & Throckmorton	1984-1990	23-28%

In *Times-Picayune Publishing Company Co. v. United States*, 345 U.S. 594, 611 (1953), the Supreme Court held that a newspapers' market share of 33-40% was insufficient to establish a per se violation of section 1. *See also, Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 27 (1984) (defendant hospital's 30 percent market share was insufficient to establish a per se violation). The plaintiffs' calculations of market share in this case do not demonstrate that any single defendant held sufficient market power to establish their tying claims as per se violations of section 1.

Because the plaintiffs have no evidence that the defendants imposed casket handling fees as a concerted effort, and because the plaintiffs have failed to offer any other evidence showing that the defendants individually held sufficient market power to sustain a per se tying claim, we will grant summary judgment in favor of the defendants on this issue.

b. The Rule of Reason Analysis

In a recent opinion, the United States Court of Appeals for the Third Circuit announced that a plaintiff attempting to establish tying claims through the rule of reason analysis need not show that the defendants have market power over the tying product. *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir. 1992). Instead, in order to avoid summary judgment, the plaintiffs must present evidence that the defendant is engaged in tying and that as a result, injury to competition, and not just to the plaintiffs, has occurred. *Id.* In other words, the plaintiffs in this case would have to show how the defendants' tying arrangements are producing anti-competitive effects in the market. Because we have ruled that there is no evidence of concerted activity on the part of the defendants to impose a tying arrangement, and because none of the defendants alone possess sufficient market power to presume anti-competitive effects under the per se rule, the plaintiffs must come up with some other theory of injury to the relevant market proximately caused by the independent actions of the defendants in imposing casket handling fees. *Id.* Because the plaintiffs have failed to do so, we will grant summary judgment in favor of the defendants concerning the plaintiffs' tying claims.

2. Plaintiffs' Claims of Group Boycott and Other Concerted Activity

In count II of their complaint, the plaintiffs allege:

> 33. Beginning in 1984 and continuing up to and through the present time, defendants have met, conferred or communicated with the aim or objective of forming an unlawful combination(s) contract(s) or conspiracy(s) and have formed an unlawful combination contract or conspiracy to destroy Greene County Memorial Park as a competitive force in the markets for burial vaults, caskets and monuments in Greene County Memorial Park [sic] for any reason.
>
> 34. The aforesaid persuasion or coercion was without business justification and was intended to destroy the efficiency of the relevant markets.
>
> 35. The aforesaid combinaben(s) [sic] or conspiracies amounted to an unlawful boycott of the cemetery wherein defendant funeral directors would unlawfully divert customers for cemetery spaces and cemetery services from Green County Memorial Park in retaliation for Greene County Memorial Park's selling funeral merchandise in violation of the antitrust laws.

Complaint ¶¶ 33-35.

The plaintiffs' various pleadings, briefs and memoranda fail to delineate the exact nature of their claims against the defendants in count II of the complaint. It appears that count II encompasses a wide array of activities which plaintiffs very loosely label a group boycott or other concerted activity in violation of section 1 of the Sherman Act. We will first discuss the extent to which the plaintiffs have established a group boycott under the most common meaning of the term.

a. Group Boycott and Price Fixing Claims

The plaintiffs in paragraph thirty-five of their complaint, characterize the defendants' actions as an unlawful boycott of the Park. Group boycotts, or concerted refusals to deal where a group of individuals or entities agree to stop doing business with another party, are per se violations of Section 1 of the Sherman Act. *See, Klor's Inc.*, 359 U.S. 207 (1959); *Radiant Burners*, 364 U.S. 656 (1961); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). A unilateral or independent refusal to deal is not prohibited by section 1. *Matsushita*, 475 U.S. 574, 587 (1986); *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985). Thus, in order to survive summary judgment on a true group boycott claim, the plaintiff must point to enough evidence of collusive action among the defendants to "show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiffs]". *Matsushita*, 475 U.S. at 553.

In this case, the plaintiffs have failed to present evidence that the defendants collectively refused to do business with the Park. The defendants, on the other hand, have offered a substantial amount of evidence that they continued to handle funeral services for deceased who were buried in the Park, and provided funeral services for individuals who purchased caskets and vaults from the Park. J. Waychoff Deposition at 21-22, 91-92; C. Waychoff Deposition at 322, 481, 526, 547; Plaintiffs' Response to Milliken and Throckmorton's First Request for Admissions No.30. Behm Funeral Home purchased vaults from the Park both before and after it began selling caskets. J. Waychoff Deposition at 21-22. Although the defendants admit that Paul Lesako stopped purchasing vaults from the Park after he learned that it was selling caskets, the plaintiffs have failed to show that his decision to stop buying vaults from the Park was anything but an independent, unilateral business decision. Because the plaintiffs have failed to show that the defendants, as a group, refused to do business with the Park, their characterization of the defendants' conduct as a group boycott is an unsupported legal conclusion.

The plaintiffs' also claim the defendants, through the GCFDA and the PFDA, "fixed fees and penalties, established higher funeral bills, boycotted plaintiffs and destroyed plaintiffs' business." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 10. Because we have already dismissed the possibility that this allegation constitutes a viable group boycott claim, we will determine the extent to which it constitutes an allegation that the defendants were party to a price fixing agreement. Price fixing agreements are also per se violations of section 1.

The only factual basis the plaintiffs offer in support of their claim that the defendants conspired to fix prices is: the Funeral Directors' admissions that they discussed methods to effectively compete with third party casket sellers; evidence that defendant Frank J. Behm gave presentations at meetings of the PFDA concerning "properly pricing services when a third party sale is made," and; evidence that one of the defendants admitted to participating in a PFDA survey of casket handling fees which was circulated to all of its members. This is not sufficient evidence of a price fixing agreement to establish a violation of section 1.

The dissemination of the PFDA survey concerning its members' pricing policies, and discussions at PFDA meetings concerning proper pricing of funeral services to recover costs incurred when handling third party caskets, without any evidence that the defendants' prices were uniform or that the defendants agreed to fix prices in some other manner, is insufficient evidence of a price fixing agreement to avoid summary judgment. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975) (exchange of general pricing information not itself per se violation of section 1). Similarly, evidence that one defendant participated in a PFDA survey of its members' prices is insufficient to raise a genuine issue of material fact as to a price fixing conspiracy among the defendants, even when considered in conjunction with the other evidence the plaintiffs have offered in support of their antitrust claims.

b. Claims of Other Concerted Activity Imposing an Unreasonable Restraint on Trade

Aside from their group boycott and price fixing claims, the Plaintiffs allege that the defendants, pursuant to a concerted effort to drive the plaintiffs out of business, placed group advertisements, interfered with plaintiffs' employees and customers, and penalized customers who purchased caskets from third parties by imposing casket handling fees. Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment at 16-19. This array of activity does not fall into the category of conduct which is so obviously anti-competitive as to warrant ordination as a per se violation of section 1 of the Sherman Act. Thus, the Court must evaluate the viability of the plaintiffs' loosely labeled "boycott" claims under the rule of reason analysis. We will first state the factors involved in the rule of reason analysis, and then determine the extent to which the evidence the plaintiffs have offered supports a section 1 claim.

In order to recover under a claim arising from section 1 of the Sherman Antitrust Act but which is not a per se violation of that statute, a plaintiff must prove: "(1) that the defendant contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy." *Tunis Bros. Co. Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991). "The Sherman Act was designed to prohibit significant restraints on trade rather than to proscribe all unseemly business practices.'" *Id.* at 728, *citing*, *Sitkin Smelting and Ref. Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir. 1978), *cert. denied*, 439 U.S. 866 (1978). The plaintiffs must demonstrate some harm to the competitive landscape from the defendants' actions. *Tunis*, 952 F.2d at 728. They must prove that the challenged conduct affected the prices, quantity or quality of goods or services. *Id.*

In this case, the plaintiffs' allegation that as part of the defendants' concerted effort to destroy third party casket sales in Greene County, the defendants placed the "care concern and compassion" advertisements in local newspapers fails to create a genuine issue of material fact for trial. Although it is undisputed that the defendants acted together to place these advertisements in local papers, we do not

believe that this action violates section 1 of the Sherman Antitrust Act. The advertisements merely urged people to beware of out of town casket salespersons and stated that it was untrue that funeral directors would gladly accept caskets purchased from them. The advertisements were expressly directed at out of town salespeople, not local cemeteries. F. J. Behm Dep. at 74,75,79-83; *see also* G. Greenlee Dep. at 28,29. According to Challen Waychoff, none of these advertisements contained false statements of fact, disparaged the plaintiffs or their products, or, to his knowledge, caused any of the plaintiff's customers to cancel contracts. C. Waychoff Dep. at 509. Although these advertisements were arguably misleading, the fact that some or all of the defendants placed these advertisements is not evidence that they produced adverse, anti-competitive effects within the relevant geographic market, or that the plaintiffs were injured as a proximate result of the defendants' actions.

The plaintiff's allegations that the defendants, as part of their group effort to drive the Park out of business, attempted to hire away two of the Park's employees and interfere with the Park's customers are also unsupported by sufficient evidence to survive summary judgment. These allegations appear to be based entirely on the deposition testimony of the Waychoffs who testified that Samuel Milliken and Darryl Throckmorton asked an employee of the Park why he was working there. J. Waychoff Deposition at 151; C. Waychoff Deposition at 397-98, 476. The Waychoffs also claim that an associate of Paul Lesako's stated to another of employee of the Park that he would starve to death working there. C. Waychoff Dep. at 326-27. It is difficult to see how either of these isolated statements evidence an attempt to hire away the Park's employees. Even if these statements can logically be construed as attempts to hire the Park's employees, there is no evidence that these incidents were part of an underlying conspiracy rather than independent action. Evidence that three of the Funeral Directors made these comments to two of the Park's employees does not support the plaintiffs' section 1 claim.

The plaintiffs have offered no evidence to support their claims that the defendants attempted to interfere with the Park's customers. The Court's independent review of the deposition testimony on record revealed only allegations by the Waychoffs that on

several occasions customers that had intended to purchase casket or vaults from the Park changed their minds after speaking with the Funeral Directors. J. Waychoff Deposition at 145-51, 206; C. Waychoff Deposition at 274-75, 334. Again, this evidence is insufficient to establish a violation of section 1 of the Act because the plaintiffs have presented no evidence that these actions were part of a coordinated effort on the part of all the defendants to drive the Park out of business, or that they produced anti-competitive effects in the relevant market. Interference with contractual relations is a state law cause of action, not the basis for an antitrust claim.

The Greenlees' statement that the funeral directors were going to "do something" about the plaintiffs' caskets sales also fails to save the plaintiffs' section 1 claims from summary judgment. This alleged statement is a vague threat, but there is no evidence that the defendants acted on this threat in a concerted manner which unreasonably restrained trade.

In summary, the plaintiffs have failed to come forward with sufficient evidence in support of their claims that the defendants engaged in concerted, anti-competitive activity within the meaning of section 1 of the Sherman Antitrust Act. They seem to presume that because the defendants are members of a trade organization, and because some of them expressed their displeasure with plaintiffs' attempts to compete with them in casket sales, they have violated the Sherman Antitrust Act. All of the evidence the plaintiffs offer in support of their claims, however, does not constitute sufficient evidence of a section 1 violation to save the plaintiffs' claims from summary judgment.

c. Plaintiffs' State Law Claims

Because we are dismissing the plaintiffs' federal claims, the Court will dismiss the plaintiffs' remaining state claims for lack of jurisdiction.

V. PEGGY BEHM'S SUMMARY JUDGMENT MOTION

In her separate motion for summary judgment, defendant Peggy Behm argues that the plaintiffs have no evidence that she participat-

ed in any of the illegal acts alleged in the complaint. Ms. Behm testified at her deposition that she works at the Behm Funeral Home but takes no part in the operation of the business. In addition, she contends she is not a licensed funeral director, and has never attended any meetings of the various funeral director associations of which her husband is a member.

Plaintiffs' original response to Ms. Behm's motion consisted of one footnote in their response to the defendants' motion for summary judgment. In this footnote, the plaintiffs state that Peggy Behm "attended at least one meeting where the Park was discussed with third persons." And that she is "in partnership with Frank Behm as to rentals of funeral equipment to Behm Funeral Home, Behm Leasing & Rental Company, and to that extent she is liable for his actions." Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment at 1 n.2. The plaintiffs also allege in this footnote that Peggy Behm is a partner in Greene County Burial Vault Co. and therefore has personally gained from the "unlawful conspiracy at issue." *Id.*

Perplexed that plaintiffs felt that a footnote was a sufficient response to Peggy Behm's separate summary judgment motion, we ordered them to file a separate response addressing the points raised by Ms. Behm. The plaintiffs filed their response but failed to explain with any greater degree of clarity why Peggy Behm should be liable for any of the acts alleged in the complaint. The plaintiffs simply stated that Peggy Behm's partnership and shareholder interests in the Behm entities create a "presumption of involvement in the conspiracies of her husband and Behm Funeral Home, Inc." *Id.* at 5. The plaintiffs have provided no support for their contention that Peggy Behm attended "at least one meeting where the Park was discussed with third persons."

Since neither Behm Leasing & Rental Co., nor Greene County Burial Vault Co. are defendants in this action, and since the plaintiffs have failed to explain why Peggy Behm should be liable for the actions of defendant Behm Funeral Home, Inc. simply because she holds stock in that corporation, we will grant Peggy Behm's summary judgment motion.

All outstanding motions not addressed by this opinion are moot. An appropriate Order will be issued.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,	)	
Plaintiffs,	)	CIVIL ACTION NO. 88-245
v.	)	
BEHM FUNERAL HOMES, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, individual; SAMUEL A. MILLIKEN, an individual; and DARRYL THROCKMORTEN, an individual,	)	
Defendants.	)	

ORDER

AND NOW, to-wit, this 7th day of July, 1992, it is ORDERED, ADJUDGED and DECREED that the plaintiffs' Motion for partial Summary Judgment is DENIED and the defendants' Motion for Summary Judgment is hereby GRANTED. It is further ORDERED that defendant Peggy Behm's Motion for Summary Judgment is hereby GRANTED. All other outstanding motions not addressed by this Order are moot.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge

No. 93-146

Supreme Court, U.S.
FILED
AUG 24 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,

Petitioners,

vs.

BEHM FUNERAL HOME, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; and DARYL THROCKMORTON, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a cemetery's claim for conspiracy to fix prices in violation of Section 1 of the Sherman Act is properly subject to dismissal by way of summary judgment when the undisputed evidence reveals that: (a) not all of the funeral directors imposed a casket handling fee and those that did adopted the fee at different times, in widely varying amounts, and years before the cemetery began selling caskets; (b) the casket handling fees were condoned by the Federal Trade Commission as a legitimate means of recouping costs incurred by funeral directors and were imposed by the cemetery itself when customers purchased caskets and vaults from sources other than the cemetery; and (c) no price information was shared between the funeral directors at any trade association meeting such that, prior to the initiation of cemetery's lawsuit, the funeral directors were unaware of the various amounts each funeral director charged as a casket handling fee?

2. Whether a cemetery's claim of a *per se* unlawful tying arrangement in violation of Section 1 of the Sherman Act is properly subject to dismissal by way of summary judgment when the undisputed evidence reveals that: (a) the funeral directors never conditioned the sale of their funeral services upon the purchase of caskets from them and no customer was ever refused funeral services from the funeral directors because the customer bought a casket from another source, including the cemetery; (b) any customer of funeral services had an option

QUESTIONS PRESENTED FOR REVIEW – Continued

to avoid the casket handling fee since not all of the funeral directors in the Greene County, Pennsylvania, market imposed such a fee; and (c) no individual funeral director possessed more than 40% of the Greene County, Pennsylvania, funeral services market?

3. Whether a cemetery is barred from raising on appeal any issue as to the applicability of the decision in *Eastman Kodak Company v. Image Technical Services* to its claims under Section 1 of the Sherman Act when it is undisputed that: (a) the cemetery never raised the *Kodak* decision to the district court by way of summary judgment argument or through an amendment to its complaint reflecting the cemetery's new definition of market power as being the market over caskets once a particular funeral director had been selected; and (b) the cemetery never developed through either expert testimony, market research or actual customer testimony the necessary facts to support the application of the *Kodak* decision or the cemetery's new market power definition?

4. Whether the decision in *Eastman Kodak Company v. Image Technical Services* is inapposite to the cemetery's claim for unlawful tying arrangement in violation of Section 1 of the Sherman Act since the relevant market in a case involving non-unique services or products is never the tied product marked (*i.e.*, caskets), but rather only the tying product market (*i.e.*, funeral services)?

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COUNTERSTATEMENT OF THE CASE

A. *Procedural Background*

On February 2, 1988, Petitioners filed this action in the United States District Court for the Western District of Pennsylvania, alleging claims against Respondents[1] for unlawful tying arrangements and group boycotts in violation of the Sherman and Clayton Anti-trust Acts, 15 U.S.C. §§1 and 14 respectively, and for tortious interference with contractual relations under Pennsylvania law. (A-2, A-10). After more than three years of discovery,

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[1] For purposes of this brief, the term "Respondents" refers to each individual and corporation named originally as a defendant in the caption of Petitioners' case. Respondents Behm Funeral Home, Inc., Frank J. Behm, Frank C. "Chuck" Behm, Gregory Rohanna, Samuel Milliken, Daryl Throckmorton and Paul Lesako are the parties who are filing this opposition brief and are referred to hereinafter as the "Respondent Funeral Directors." Respondents Gordon and Barret Greenlee ("the Greenlees") have not participated in any of the proceedings subsequent to the district court's entry of summary judgment against Petitioners and have not joined in the filing of this brief. The Greenlees and the Respondent Funeral Directors are collectively referred to hereinafter as the "Funeral Directors."

Respondent Peggy Behm is not a party to any of the issues raised by the petition for writ of certiorari, those issues having been abandoned by Petitioners on appeal to the United States Court of Appeals for the Third Circuit. Therefore, Respondent Peggy Behm has not joined in this opposition brief.

Finally, to the extent required by Rule 29.1 of this Court's Rules, Respondent Behm Funeral Home, Inc., is a Pennsylvania corporation owned and operated by Respondents Frank J. Behm, Frank C. Behm and Gregory Rohanna. Behm Funeral Home has no parent company or subsidiary, except a wholly-owned subsidiary known as Behm Leasing & Rental Company.

Petitioners moved on September 16, 1991, for partial summary judgment as to the liability of the Respondents for unlawful tying and, on the same date, Respondents moved for summary judgment as to all the claims raised by Petitioners against them. (A-2, A-10).

On July 2, 1992, the district court entered a thirty-three page opinion and order denying Petitioners' partial summary judgment motion and granting Respondents' separate motions for summary judgment. (A-17-A-35). The district court also dismissed as moot all other outstanding motions not addressed by its July 7, 1992 order. (A-32, A-35).

On July 30, 1992, Petitioners appealed the district court's order to the United States Court of Appeals for the Third Circuit. On appeal, Petitioners abandoned their arguments of error as to the district court's dismissal of their claims against Respondent Peggy Behm, their claims for unlawful tying of vaults to funeral services, and their claims for violations under Section 3 of the Clayton Act, choosing instead to raise only issues pertaining to their claims under Section 1 of the Sherman Act. (A-2, A-3).

On April 26, 1993, the Third Circuit affirmed the district court's dismissal of Petitioners' action and taxed costs against Petitioners. (A-2, A-3, & A-9). On May 9, 1993, Petitioners requested the Third Circuit to reconsider its affirmance of the district court's dismissal and suggested a rehearing *en banc*. On May 24, 1993, the Third Circuit denied Petitioners' request.

On May 27, 1993, the district court, upon motion of the Respondent Funeral Directors and Peggy Behm,

found that it was clear from the record that "the [Petitioners'] counsel violated Federal Rule of Civil Procedure 11 in continuing to prosecute this action after it was apparent that it had no merit." (SA-1-SA-2). On June 10, 1993, Petitioners requested the district court to reconsider its May 27, 1993 finding, which the district court denied on July 27, 1993. (SA-4-SA-5). On that same date, the district court entered a memorandum order supporting its finding of a Rule 11 violation and ordering Petitioners' counsel to pay $20,000 for distribution to the Respondent Funeral Directors and Peggy Behm on a pro rata basis. (SA-3-SA-6).

Shortly before the sanction order was entered, Petitioners filed this Petition for Writ of Certiorari to this Court.

B. *Factual Background*

This lawsuit involves certain anti-trust allegations asserted by a cemetery located in Greene County, Pennsylvania, against the Funeral Directors, who are located in and/or do business in Greene County, Pennsylvania. (A-2, A-11). In recent years, the Funeral Directors and other funeral homes and directors in the Greene County market area came under competition from third-party sellers of caskets and burial vaults. (A-2). These sellers underpriced the funeral directors' charges for these types of funeral merchandise, thus depriving the funeral directors of substantial profits. (A-2).

In response, the Funeral Directors, through their respective trade associations, met with the other funeral homes and directors doing business in Greene County,

Pennsylvania, and discussed the problem of third-party sales and what to do about them. (A-2). As a result of these meetings, the Funeral Directors ran a series of joint advertisements warning the public of the "dangers" of buying funeral merchandise from third-party sellers. (A-2). The joint advertisements were truthful and were directed at the activities of certain door-to-door salesmen and not those of the Petitioners. (A-8). In fact, at the time the Funeral Directors began placing the advertisements, Petitioners were not even in the business of selling caskets. (A-8, A-12).

In addition to the joint advertisements and *not as a result of their attendance at the association meetings,* some but not all of the Funeral Directors imposed "casket handling fees" on customers who purchased their caskets from a source other than the funeral director performing the funeral service. (A-14). These fees were designed to recover the costs which a funeral director incurred when handling caskets purchased from third-party vendors and are condoned by the Federal Trade Commission. (A-14). In addition, when Petitioners entered the funeral merchandise market, Petitioners themselves imposed their own handling fees when customers purchased caskets and vaults from others. (A-14).

The Funeral Directors who adopted casket handling fees did so at various times and before Petitioners began selling caskets. (A-3). Moreover, the casket handling fees charged varied widely, ranging from $200 to $425. (A-3). The reason for this variance was because, prior to the initiation of Petitioners' lawsuit, none of the Funeral Directors were aware of what amount, if any, each of the other Funeral Directors were charging for the handling of

third-party caskets. (A-25). In fact, no price information of any kind was shared between the Funeral Directors at any of the association meetings they attended. (A-3).

Despite the joint advertising and the imposition of casket handling fees, the Funeral Directors continued to handle funeral services for decedents who were buried at the Petitioners' cemetery and to provide funeral services for individuals who purchased caskets and vaults from the Petitioners. (A-28). Additionally, none of the Funeral Directors' price lists conditioned the provision of funeral services upon the purchase of caskets and no customers were ever refused services because the customers had bought their caskets from a third-party seller. (A-4, A-18). Moreover, the Funeral Directors, as a group, never interfered with any contractual relationship of the Petitioners with either their employees or customers and, indeed, none of the Petitioners' contracts with their customers were cancelled and none of their employees or independent contractors left their employ as a result of the Funeral Directors' activities. (A-13, A-15).

The joint advertising enacted by the Funeral Directors was endorsed by at least eight other funeral directors or homes who did business in Greene County, Pennsylvania. (A-4, A-12). Those other funeral directors and homes were not joined as defendants in this case and there is no evidence that those funeral directors and homes charged a casket handling fee. (A-4).

After three years of discovery, Petitioners could produce no evidence that the Respondent Funeral Directors agreed and conspired to fix prices by adopting a uniform casket handling fee as a means of defeating competition.

(A-3). Further, Petitioners could produce no evidence, by way of written contract and/or actual or threatened refusal to provide funeral service to a customer, which indicated that the Respondent Funeral Directors conditioned the provision of their funeral upon the customers' purchase of caskets from them. (A-4). Finally, Petitioners produced no evidence, by way of marketing survey, affidavit or deposition testimony, that any customer was ever coerced into buying a casket from one of the Respondent Funeral Directors. (A-4).

Moreover, the only market survey or study prepared by Petitioners was a "questionable market survey based on the number of funerals conducted by defendants divided by the total deaths in Greene County." (A-5). Based upon this survey, Petitioners' own evidence indicated that none of the Respondent Funeral Directors had more than 40% of the share of funeral services market in Greene County, Pennsylvania. (A-5).

Faced with the above facts, the district court concluded that Petitioners' claims under both the Sherman and Clayton Acts were meritless, thereby justifying a denial of Petitioners' partial summary judgment motion and a granting of the Respondent Funeral Directors' summary judgment motion. In fact, the district court found that the Petitioners' motions and briefs were plagued by "exaggerations and inaccurate interpretations" which "forced" the district court "to scrutinize with unusual care all of the [Petitioners'] representations." (A-18). Even under this unusual scrutiny, the district court found that Petitioners' claims were lacking in both fact and law. (A-17-A-32).

After analyzing Petitioners' claims for unlawful tying, group boycott and conspiracy to fix prices under both the *per se* and rule of reason approaches for anti-trust liability, the district court made the following observation about Petitioners' case:

> In summary, the plaintiffs have failed to come forward with sufficient evidence in support of their claims that the defendants engaged in concerted, anti-competitive activity within the meaning of Section 1 of the Sherman Anti-trust Act. They seem to presume that because the defendants are members of a trade organization, and because some of them expressed their displeasure with the plaintiffs' attempts to compete with them in casket sales, they have violated the Sherman Anti-trust Act. All of the evidence the plaintiffs offer in support of their claims, however, does not constitute sufficient evidence of a Section 1 violation to save the plaintiffs' claims from summary judgment.

(A-32).

On appeal, the Third Circuit Court of Appeals agreed with the district court and found that all of Petitioners' contentions were "meritless." (A-3). Specifically, as to Petitioners' claims for conspiracy to fix prices, the Third Circuit found that there was no evidence of concerted activity by the Funeral Directors. (A-3). Similarly, as to Petitioners' claims for *per se* unlawful tying, the Third Circuit found that there existed no express tying arrangement or fair inference thereof from the undisputed evidence in the record, that Petitioners produced no evidence of actual customer coercion, and that the record was devoid of any evidence indicating that any funeral

director possessed sufficient market power to be liable for a *per se* unlawful tying arrangement. (A-4, A-5). Additionally, the Third Circuit noted that, even under the rule of reason analysis, Petitioners' unlawful tying claims were without merit since Petitioners failed to produce any evidence that the Funeral Directors' activities harmed competition, rather than the Petitioners themselves. (A-7).

Furthermore, the Third Circuit found that the Petitioners' arguments as to the applicability of this Court's decision in *Eastman Kodak Company v. Image Technical Services,* 112 S.Ct. 2072 (1992), were barred both procedurally and substantively. Procedurally, the Third Circuit found that the Petitioners failed to raise the *Kodak* decision to the district court either in their pleadings or summary judgment argument or through sufficient evidence of either market studies or actual customers which would support Petitioners' argument that the relevant market at issue was the market over caskets once a particular funeral director had been selected. (A-5, A-6). In light of this failure, the Third Circuit found that Petitioners were barred procedurally from arguing on appeal the applicability of the *Kodak* decision. (A-6).

Furthermore, even if Petitioners could raise the issue, the Third Circuit found that the relevant market in a tying claim is never the tied product (*i.e.*, caskets), but rather the tying product market (*i.e.*, funeral services), citing its decision in *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir.), *cert. denied,* 113 S.Ct. 196 (1992). (A-6). Also, the Third Circuit noted that the *Kodak* decision did not change the application of

this general principle of anti-trust law to the Petitioners' case because the provision of funeral services and caskets was not unique. (A-7).

Finally, the Third Circuit addressed Petitioners' other claims of error by the district court and dismissed them accordingly on the basis that "none of them have any merit, even granting [Petitioners] all inferences in their favor." (A-7-A-9).

REASONS FOR DENYING THE PETITION

This Petition for Writ of Certiorari represents just another of the many avenues taken by Petitioners and their counsel in continuing to prosecute an action which is completely lacking in merit, both in fact and in law. The Petitioners attempt to attribute some importance to their case by stating that the Petition presents this Court with a "broad public policy issue of national significance." However, the fallacy with Petitioners' assertion is that they have presented no evidence to support any of their allegations of Section 1 Sherman Act violations. Both the district court and the Third Circuit Court of Appeals saw right through the smokescreen raised by Petitioners and the Respondent Funeral Directors respectfully request this Court to do the same by denying the Petition.

Additionally, a denial of this Petition is consistent with the previous decisions of this Court and the other circuits in the anti-trust area, as well as with the Third Circuit's decision in *Town Sound and Custom Tops,* which was cited in support of the Third Circuit's ruling in this

case. On October 5, 1992, this Court denied the petition for writ of certiorari filed from the *Town Sound and Custom Tops* decision. *See* 113 S.Ct. 196 (1992). This denial of certiorari occurred four months after this Court's decision in *Kodak* and supports the conclusion that the Third Circuit and the district court were correct in their analysis and dismissal of Petitioners' case.

For these reasons and the reasons set forth in this Brief, Respondent Funeral Directors respectfully request this Court to deny the Petition for Writ of Certiorari.

I.

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY FOUND THAT A RATIONAL JURY COULD NOT INFER A CONSPIRACY TO FIX PRICES BY RESPONDENT FUNERAL DIRECTORS IN LIGHT OF THE UNDISPUTED EVIDENCE THAT NOT ALL OF THE FUNERAL DIRECTORS IMPOSED CASKET HANDLING FEES, THOSE THAT DID ADOPTED THE FEES AT DIFFERENT TIMES, IN WIDELY VARIOUS AMOUNTS AND YEARS BEFORE PETITIONERS BEGAN SELLING CASKETS, AND NO PRICE INFORMATION WAS SHARED BETWEEN THE FUNERAL DIRECTORS AT ANY ASSOCIATION MEETINGS. THEREFORE, SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT FUNERAL DIRECTORS WAS APPROPRIATE.

The Petitioners' first reason for why its Petition for Writ of Certiorari should be granted is that the district court and Third Circuit Court of Appeals erred in holding that a jury could not rationally infer from the facts of

record the existence of a conspiracy among the Respondent Funeral Directors to fix prices. In short, Petitioners believe that once they have proven that meetings were held and that some funeral directors imposed casket handling fees, then sufficient evidence exists upon which a jury can rationally infer the existence of a conspiracy to fix prices. However, the fallacy in Petitioners' argument is quite evident.

As both the Third Circuit and the district court noted, in order for a conspiracy to exist with regard to the fixing of prices, there must be some evidence that price information was shared between the alleged co-conspirators and that the Funeral Directors agreed to act upon such information in a concerted effort. However, the undisputed evidence in this case reveals that no price information was shared between the Funeral Directors at any association meeting they attended. (A-3). In fact, the deposition testimony submitted by Petitioners at the time of summary judgment revealed that, prior to the initiation of this lawsuit, the Funeral Directors were unaware of what amount, if any, each of the Funeral Directors charged for casket handling fees. (A-25). Petitioners offered no evidence to contradict this conclusion. Therefore, under these circumstances, both the Third Circuit and the district court correctly held that a rational jury could not infer a concerted effort to fix prices.

Furthermore, the lower courts' decisions were correct and in accord with this Court's decisions in *Monsanto Company v. Spray Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In those cases, this Court held that if a defendant's conduct is consistent with both

permissible and anti-competitive motives, such conduct standing alone does not avoid summary judgment without evidence tending to exclude the possibility that the defendants acted independently. *See Matsushita Electric,* 475 U.S. at 588.

In the case at hand, the undisputed evidence reveals that not all of the Funeral Directors imposed casket handling fees and those that did adopted such fees at different times and years before Petitioners began selling caskets. (A-3, A-25). In fact, the evidence before the district court revealed that Petitioners did not begin selling caskets until October 1987, while Respondents Milliken and Throckmorton instituted their casket handling fees in 1984 and Respondent Behm Funeral Home adopted its casket handling fees prior to 1984. (A-11, A-12, A-25).

Furthermore, the fees charged by the Funeral Directors who adopted casket handling fees varied widely, ranging from $200 to $425. (A-3). Finally, these same fees were condoned by the Federal Trade Commission and imposed by the Petitioners themselves upon decedents who were buried at Petitioners' cemetery in a casket or vault not purchased from Petitioners. (A-14).

In light of these facts, the Third Circuit and district court had only one conclusion to reach, that being, a rational jury could not infer any concerted activity on the part of the Funeral Directors in imposing casket handling fees. Petitioners' only response to this argument is that "the facts are clear that Funeral Directors worked together closely on the fees they imposed" and that the Third Circuit failed to take a "look at the whole picture." However, it is the Petitioners who have ignored the

undisputed evidence in this case, for Petitioners' own evidence revealed that the Funeral Directors had no knowledge of when and in what amount each of the other Funeral Directors had imposed casket handling fees. (A-25).

Moreover, it is the Petitioners who are mistaken as to the respective burden they bear in opposing a summary judgment motion in an anti-trust lawsuit. As this Court explained in *Matsushita* and *Monsanto,* although inferences to be drawn from the underlying facts must be viewed in a light most favorable to the opposing party, such inferences when drawn from ambiguous evidence are circumscribed in anti-trust cases because a fine line demarcates concerted action that violates anti-trust law from legitimate business practices. *See Matsushita,* 475 U.S. 587-588; *Monsanto,* 465 U.S. at 762-64. As such, a jury is not permitted to speculate as to the cause from a chain of events; rather, the plaintiff must demonstrate adequately "a unity of purpose or common design and understanding, or a meeting of the minds" in order to prove concerted action. *See American Tobacco Company v. United States,* 328 U.S. 781, 810 (1946). Accordingly, this Court admonished in *Monsanto* that juries should not be permitted to infer the existence of an agreement in violation of the Sherman Act merely from the fact that the act occurred, for permitting such an inference would deter or penalize perfectly legitimate conduct. *See Monsanto,* 465 U.S. at 763-64.

In the case at hand, Petitioners failed to produce any evidence that the Respondent Funeral Directors adopted and imposed casket handling fees as a concerted action. In fact, the undisputed evidence revealed that the

Respondent Funeral Directors acted independently and without knowledge of the other funeral directors' activities and charges. In light of this evidence, both the Third Circuit and district court properly found that Petitioners had failed to state a claim for conspiracy to fix prices in violation of Section 1 of the Sherman Act. Therefore, this Petition for Writ of Certiorari should be denied.

II.

THE COURT OF APPEALS AND THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS FAILED TO STATE A CLAIM FOR UNLAWFUL TYING UNDER EITHER THE *PER SE* TEST OR RULE OF REASON APPROACH. THEREFORE, PETITIONERS' SHERMAN ACT CLAIMS FOR UNLAWFUL TYING WERE PROPERLY DISMISSED.

Another basis under which the Petitioners claim that a writ of certiorari is appropriate is the lower courts' determination that Petitioners' allegations of unlawful tying failed to state claims under Section 1 of the Sherman Act. In essence, Petitioners claim that the Third Circuit did not "look at the whole picture," as well as the "obvious" implications of the facts before the district court. However, it is the Petitioners who have failed to look at the undisputed evidence that was before the lower courts and upon which those courts relied in support of their determination that Petitioners failed to state any claim for unlawful tying in violation of the Sherman Act.

As the Petitioners acknowledged on appeal to the Third Circuit, their sole evidence of a tying arrangement was the Funeral Directors' price lists. These price lists

had no language which set forth a tying arrangement (*i.e.*, that funeral services would only be provided if the caskets were purchased from the Funeral Directors). (A-4). In fact, most of the price lists contained the following form language which clearly negated the existence of any tying arrangement:

> The goods and services shown below are those we can provide to our customers. *You may choose only those items you desire.*

Moreover, the use of price lists by funeral directors is required by the Federal Trade Commission and the language on the price lists which Petitioners cite as indicative of a tying arrangement was drafted by the FTC as part of its regulations in this area. Therefore, where one is required as a matter of law to provide customers with price lists that contain certain language, it cannot be inferred that such lists constitute tying arrangements.

Furthermore, as the Third Circuit noted, if Petitioners could show that a customer was threatened with or actually refused funeral services if he or she did not purchase a casket from one of the Funeral Directors, then an express tying arrangement or a fair inference thereof could be proven. (A-4). Unfortunately for Petitioners, no such evidence exists. (A-4). It was undisputed that customers were permitted to buy caskets elsewhere and, in fact, could have purchased caskets without incurring any casket handling fee by seeking the services of either the Greenlees or other funeral directors in the Greene County, Pennsylvania market who may not charge such fees. (A-4). Also, it was undisputed that no Funeral Director ever refused services to a customer because that customer bought a casket from a third party such as the

Petitioners. (A-4). Given this undisputed evidence, both the Third Circuit and the district court correctly found that no express contractual provision or a fair inference thereof could be supported by the record before them. (A-4, A-5, A-23).

Additionally, both courts noted that a tying arrangement could not be inferred by evidence of actual coercion because the Petitioners, for whatever reason, refused to produce any evidence that customers were coerced into buying caskets from the Funeral Directors. (A-4). Petitioners produced no marketing survey, but rather relied solely on the fact that casket handling fees were adopted by some of the Funeral Directors and on the assumption that consumers may buy both funeral services and caskets from some of the Funeral Directors to avoid the fee. However, as the Third Circuit correctly noted, such evidence does not establish consumer coercion. (A-4, citing *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1224-25 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976)). This conclusion is especially true in light of the undisputed evidence in this case that customers in the Greene County, Pennsylvania, market had an option to avoid the casket handling fee by seeking the services of the Greenlees or the eight other funeral homes or directors who did business in the Greene County, Pennsylvania, market but were not joined as defendants by Petitioners. (A-4, A-5). Hence, the lower courts properly found that no genuine issue of material fact existed as to whether the Funeral Directors expressly tied the provision of funeral services to the sale of caskets.

Furthermore, even if such an express tying arrangement did exist, which is denied, Petitioners' own

evidence negated the existence of the second element for an unlawful tying arrangement, that being that the individual Funeral Directors held sufficient market power over the tying product. This Court has emphasized that a market power analysis is the first order of business in a *per se* unlawful tying analysis. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-29 (1984). As such, this Court has stated that condemnation of tying arrangements is appropriate only if the supplier supplying the tied product possesses sufficient market power to restrain competition on the merits by foreclosing purchases which would not otherwise be made. *Jefferson Parish*, 466 U.S. at 13-14. Moreover, this Court has held that a market share of no more than 40% is not a sufficient enough market power to restrain competition under a *per se* unlawful tying analysis. *See Jefferson Parish*, 466 U.S at 27; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953).

In the district court below, Petitioners introduced a market survey based upon the number of funerals conducted by the Funeral Directors divided by the total number of deaths in Greene County. (A-25). Even though both the district court and the Third Circuit questioned the accuracy of Petitioners' survey since it was based upon the total deaths rather than the total number of funerals held in Greene County, that survey revealed that none of the Respondent Funeral Directors had a market share of more than 40%. (A-5, A-25). As such, taking Petitioners' evidence as true, no individual Funeral Director has sufficient market power to be guilty of a *per se* Sherman Act violation in accordance with this Court's

previous holdings in *Jefferson Parish* and *Times-Picayune Publishing*.

Since the undisputed evidence indicated that there existed no tying arrangement and that no individual Funeral Director had sufficient market power in the provision of funeral services in Greene County, Pennsylvania, the Third Circuit and the district court properly held that Petitioners failed to produce sufficient evidence to raise a genuine issue of material fact as to whether the Respondent Funeral Directors were guilty of a *per se* unlawful tying arrangement in violation of the Sherman Act. Petitioners raise no issue in their Petition that should cause this Court to reverse this conclusion. Consequently, the Petitioners' claims for unlawful tying were properly dismissed by way of summary judgment and their Petition for Writ of Certiorari should be denied.

III.

PETITIONERS' RELIANCE ON THE DECISION IN *EASTMAN KODAK COMPANY v. IMAGE TECHNICAL SERVICES* IS PROCEDURALLY BARRED SINCE PETITIONERS NEVER RAISED THE DECISION OR DEVELOPED THE NECESSARY FACTS BEFORE THE DISTRICT COURT TO SUPPORT ANY CONSIDERATION OF PETITIONERS' ARGUMENT ON APPEAL.

Presumably, because the Petitioners could not fault the district court for its dismissal of Petitioners' unlawful tying claims on the basis that no individual Funeral Director possessed sufficient market power in the funeral services market, Petitioners argued on appeal to the Third Circuit that the relevant market in their case was the market over caskets once a particular funeral director

had been selected by a consumer. (A-5). If that theory was adopted, as Petitioners have argued it should be, then the market power of a funeral director in his own home is 100% and the case purportedly would come within the decision from this Court in *Eastman Kodak Company v. Image Technical Services*, 112 S.Ct. 2072 (1992). However, as the Third Circuit correctly noted, Petitioners are procedurally barred from raising such an issue on appeal for several reasons.

In the district court, the Petitioners never argued that the relevant market was the market over caskets once a particular Funeral Director had been selected by consumers. Rather, Petitioners raised this argument to the Third Circuit in light of this Court's decision in *Kodak*. However, as the Third Circuit correctly noted, the *Kodak* decision was decided on June 8, 1992, one month before the district court's decision on July 7, 1992. (A-5). Petitioners did not file a supplemental brief citing the *Kodak* decision. (A-5, A-6). Nor did Petitioners seek to amend their complaint to allege this new definition of market power or to file a motion for reconsideration bringing these matters to the district court before presenting the appeal to the Third Circuit. (A-6).

More importantly, Petitioners never even developed the facts necessary to support their new market definition while the case was in the district court. As the Third Circuit correctly noted, Petitioners could have engaged experts, performed market research or looked for actual customers who wanted to switch funeral homes or buy a third-party casket after the Funeral Director was selected but could not do so because of the Funeral Director's dominance in the market once he or she had been

selected. (A-6). However, for whatever reason, Petitioners introduced no such evidence at the district court level. (A-6).

In its petition, Petitioners failed to mention these procedural deficiencies or the fact that the Third Circuit found these deficiencies a bar to Petitioners' reliance on the *Kodak* decision as part of their appeal. The reason for their failure to disclose such deficiencies is obvious, for as the Third Circuit correctly noted, failure to raise a question which the district court never had a chance to decide bars a party from raising the issue on appeal. *See, Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n. 11 (1975); *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975).

Any reliance by the Petitioners on this Court's decision in *Kodak* is inappropriate and cannot serve as a basis for the granting of a writ of certiorari. As such, Petitioners' request for certiorari should be denied.

IV.

EVEN IF PETITIONERS ARE NOT PROCEDURALLY BARRED FROM RAISING THE *KODAK* DECISION, THE THIRD CIRCUIT CORRECTLY NOTED THAT THE *KODAK* CASE IS INAPPOSITE TO PETITIONERS' LAWSUIT AND DOES NOT COMPEL A CONTRARY HOLDING THAT PETITIONERS FAILED TO STATE CLAIMS OF VIOLATIONS UNDER THE SHERMAN ACT.

In their Petition, Petitioners claim that the dismissal of their claims under Section 1 of the Sherman Act is contrary to this Court's decision in *Kodak*. According to Petitioners, the fault of the lower courts was their failure

to resolve the case by focusing on the particular facts disclosed in the record and the economic reality of the market at issue. However, it is again the Petitioners, not the lower courts, which have failed to focus on the particular facts disclosed in the record.

The Petitioners' blindness to the facts in this case is illustrated by the Petitioners' complete misreading of the *Kodak* decision. In *Kodak,* this Court was faced with the situation where the defendant controlled the vast majority of the market for servicing of its own copiers and virtually the entire market for its replacement parts. *Kodak,* 112 S.Ct. at 2077. The defendant had admitted that it had implemented a policy of selling parts to third parties only if they agreed not to buy servicing from independent service organizations and pressured its own suppliers into not selling parts to the third-party servicers. *Id.* at 2077-2078, 2080. Finally, and most importantly, the defendant in *Kodak* had a virtual monopoly on the parts market for its machines since no other vendor's parts or equipment were compatible with the Kodak machines and parts and, as such, the defendant's products were "unique." *Id.* at 2088. Given these facts, this Court held that the parts market, not the new copier market, was the proper focus of the anti-trust inquiry in that case. *Id.* at 2088.

In contrast, the case presented by this Petition does not involve "unique" or non-compatible funeral services or caskets. (A-7). The funeral services provided by the Respondent Funeral Directors, as well as the merchandise they sell, is easily substituted or interchangeable with the funeral services provided by the Greenlees and the eight other funeral directors not named as defendants in this

case, as well as the merchandise sold by Petitioners themselves. As such, the market situation which existed in the *Kodak* case does not exist in this case. (A-7).

As the Third Circuit found in its decision in *Town Sound and Custom Tops*, the relevant market in a tying claim where non-unique services and products are involved is never the tied product market, but rather the tying product market. (A-6). The Third Circuit's decision in *Town Sound and Custom Tops* was premised upon this Court's decision in *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), in which this Court held that the relevant product market includes all products which are "reasonably interchangeable with" the product at issue. *E.I. DuPont*, 351 U.S. at 404. On October 5, 1992, this Court denied the petition for writ of certiorari filed in the *Town Sound and Custom Tops* case, thereby implicitly affirming the Third Circuit's holding that the relevant market is never the tied product market. *See* 113 S.Ct. at 196. As such, since the provision of funeral services and the sale of caskets are not unique, it is quite irrelevant whether the Respondent Funeral Directors have market power over caskets once they are selected by the customer to perform funeral services. (A-6).

Furthermore, the Third Circuit's disposition of the Petitioners' arguments regarding the applicability of the *Kodak* decision is in accord with this Court's decisions in other anti-trust cases. For example, contrary to Petitioners' contentions, this Court has held that one's membership in trade associations or attendance at their meeting where pricing and competitors are discussed is insufficient evidence of a violation under the anti-trust laws. *See Northwest Wholesale Stationers, Inc. v. Pacific*

Stationery & Printing Co., 472 U.S. 284, 295 (1985); *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 113 (1975). Additionally, this Court held in *Matsushita Electric* that summary judgment in favor of a defendant is proper where the plaintiff fails to present evidence that tends to exclude the possibility that the alleged conspirators acted independently. *Matsushita Electric*, 475 U.S. at 553.

Additionally, the Third Circuit's decision in this case is consistent with this Court's recent pronouncement regarding the purposes of the Sherman Act. As this Court recently stated in *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884 (1993):

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, 113 S.Ct. at 891-92, *citing Brunswick Corp. v. Bowl-o-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986); and *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Finally, the lower courts' decisions in this case are consistent with the decisions from other circuits which have addressed similar issues as those raised by the Petitioners in this case. *See, e.g., Shop & Save Food Markets, Inc. v. Pneumo Corp.*, 683 F.2d 27 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Seidenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100 (5th Cir. 1985); *King v. Idaho Funeral Service Association*, 862 F.2d 744 (9th Cir. 1988); *Kline v.*

Coldwell, Bankr. & Co., 508 F.2d 226 (9th Cir.1974), *cert. denied*, 421 U.S. 963 (1975).

Consequently there exists no basis upon which this Court should exercise jurisdiction by way of writ of certiorari. Accordingly, Petitioners' request for the same should be denied.

CONCLUSION

The only "obvious injustice" which exists in this case is the Petitioners' continued prosecution of claims where there exists no factual or legal basis for the same. Both the Third Circuit Court of Appeals and the district court below correctly determined that, after more than three years of discovery, Petitioners lacked sufficient evidence to support their claims against Respondent Funeral Directors for unlawful tying arrangements and conspiracy to fix prices in violation of Section 1 of the Sherman Act. Their decisions should not be reversed. Accordingly, this Court is respectfully requested to deny the Petition for Writ of Certiorari filed in this matter.

Dated: August 23, 1993

Respectfully submitted,

MEYER, UNKOVIC & SCOTT

RONALD L. HICKS, JR.

Counsel of Record for Respondents

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 88-245
BEHM FUNERAL HOMES, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; and DARRYL THROCKMORTEN, an individual,	)	
Defendants.	)	

ORDER

AND NOW, to-wit, this 27th day of May, 1993, the Court having considered the "Motion Pursuant to Rule 11 on Behalf of Defendants Behm Funeral Homes, Inc., Frank J. Behm, Frank C. 'Chuck' Behm, Peggy Behm, Gregory Rohanna, Paul Lesako, Samuel A. Milliken and Daryl Throckmorton For Counsel Fees and/or Other Sanctions Against Plaintiffs and Plaintiffs' Counsel, Louis M. Tarasi and Joseph J. Hinchliffe," and determining that

it is clear from the record that the plaintiffs' counsel violated Federal Rule of Civil Procedure 11 in continuing to prosecute this action after it was apparent that it had no merit, it is hereby ORDERED, ADJUDGED and DECREED that counsel for the defendants who filed the Motion for Rule 11 sanction (Document 78) shall by June 11, 1993, submit affidavits summarizing the number of hours they spent on this case, their expenses, and their hourly rates.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,	)	
Plaintiffs,	)	CIVIL ACTION
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Defendants.	)	

MEMORANDUM ORDER

The facts of this case are set forth in detail in this Court's Opinion dated July 7, 1992. In short, the plaintiffs were a cemetery company and funeral vault company that also sold caskets. The plaintiffs asserted that the defendants, which were mostly funeral homes and the individual funeral directors who owned them, had joined together to drive the plaintiffs out of business and in doing so violated various federal antitrust laws and state

laws. After extensive discovery the defendants filed summary judgment motions, as did the plaintiffs. In our July 7, 1992 Opinion and Order this Court denied the plaintiffs' summary judgment motion and granted the defendants' summary judgment motions. Shortly thereafter most of the defendants filed a motion pursuant to Federal Rule of Civil Procedure 11 for counsel fees as sanctions against the plaintiffs' attorneys, Joseph J. Hinchliffe and Louis M. Tarasi, Jr.

After our decision granting summary judgment was affirmed by the Court of Appeals for the Third Circuit in an unpublished Opinion dated April 26, 1993 we granted the defendants' motion for Rule 11 sanctions and ordered the attorneys who filed the motion to submit affidavits summarizing the costs incurred by their clients in defending this lawsuit. We stated in this Order that it was clear from the record that the plaintiffs' attorneys had violated Rule 11 in continuing to prosecute this case after it was clear that there was no evidence supporting their claims. The affidavits submitted by defendants' counsel revealed that Behm Funeral Homes, Inc., Frank J. Behm, Frank C. Behm, Peggy Behm and Gregory Rohanna incurred $135,389.70 in legal fees and $8,642.67 in expenses. Defendant Paul Lesako incurred legal fees in the amount of $34,125.87 and $231.56 in expenses. Defendants Samuel A. Milliken and Daryl Throckmorton incurred $63,839.55 in legal fees and $8,924.83 in expenses. In total then, these defendants have spent $178,440.40 in attorneys' fees and $17,799.06 in expenses defending themselves in this action.

In response to our May 27, 1993 Order granting the defendants' motion for Rule 11 Sanctions, the plaintiffs

filed a motion for reconsideration. We will deny this motion and explain why we feel that plaintiffs counsel continued to prosecute this action long after it was clear that there was no evidence to support the allegations in the complaint and that Rule 11 sanctions are appropriate.

One of the plaintiffs' claims in their complaint, and in their Memorandum in Opposition to Defendants' Motions for Summary Judgment and in Further Support of Plaintiffs' Motions for Summary Judgment (Plaintiffs' Brief) was that the defendants conspired to hire away their employees and to interfere with their contracts with customers. Complaint ¶¶ 23, 25; Plaintiffs' Brief at 17. Yet at no point did the plaintiffs' counsel direct the Court to any evidence that supported these claims. This forced the Court to read all of the depositions filed in this case in an unsuccessful attempt to find some support for these allegations. *See* July 7, 1992 Opinion at 7-8.

The plaintiffs also claimed that the defendants' use of casket handling fees violated section 1 of the Sherman Act, 15 U.S.C. § 1. A key element to a section 1 claim is concerted action. In this case the plaintiffs presented no evidence that the defendants' use of casket handling fees was a concerted effort to drive the plaintiffs out of business. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The evidence acquired during discovery was actually to the *con*trary. The evidence revealed that not all the defendants even used casket handling fees and the ones that did used different rates and imposed their fees at different times over the years.

The plaintiffs also asserted that the defendants had engaged in a group boycott against them. Complaint ¶¶ 33-35. Although the exact nature of this claim was never described by the plaintiffs' counsel, it was baseless under any theory. The plaintiffs themselves admitted that only one of the defendants stopped doing business with them. *See* July 7, 1992 Opinion at 25. The other defendants continued to do business with the plaintiffs.

Plaintiffs' counsel included as a defendant in this case Peggy Behm. Ms. Behm filed a separate motion for summary judgment. In this motion she pointed out that although she works at the Behm Funeral Home, she took no part in its management. She explained that she is not a licensed funeral director and has never attended meetings of funeral directors. The plaintiffs responded to this motion by stating that Peggy Behm attended at least one meeting where the plaintiffs were "discussed with third persons" and that she is "in partnership with Frank Behm as to rentals of funeral equipment to Behm Funeral Home, Behm Leasing & Rental Company" and that she is a partner in Greene County Burial Vault Company. Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment at 1 n.2. In a supplemental response to Peggy Behm's summary judgment motion ordered by the Court, the plaintiffs' counsel stated that Peggy Behm's partnership and shareholder interests in the Behm entities create a "presumption of involvement in the conspiracies of her husband and Behm Funeral Home, Inc." Supplemental Response at 5. We granted Peggy Behm's motion for summary judgment and noted that the only entity named as a defendant in this case is Behm Funeral Home, Inc. in which Peggy Behm is only a

shareholder. The plaintiffs, even after having been ordered to file a supplemental response to Peggy Behm's summary judgment motion, failed to provide any evidence to support their contentions that she attended at least one meeting "with third parties" where the plaintiffs were discussed or that she participated in the "conspiracies of her husband and Behm Funeral Home." Despite having no evidence at all to support the plaintiffs' claims against Peggy Behm, plaintiffs' counsel continued to insist that the Court should deny Peggy Behm's summary judgment motion.

For the foregoing reasons we hold that the plaintiffs' counsel has violated Rule 11 in this case.

We could, we believe, in all fairness, order plaintiffs' counsel to pay more than the $20,000 imposed by the following order. We are not going to do so, however, because it appears that when this action was filed, based on the information the attorneys had at that time there may have appeared to be valid grounds for filing their complaint. The egregious error of plaintiffs' lawyers came after discovery was completed, and they continued to press the case when it should have been obvious that their efforts were doomed.

AND NOW, to wit, this 23rd day of July, 1993, it is ORDERED, ADJUDGED and DECREED that plaintiffs' counsel, Joseph J. Hinchliffe and Louis M. Tarasi, Jr. shall pay to the Clerk of Court the sum of twenty thousand dollars ($20,000.00) on or before August 1, 1993.

The Clerk shall then distribute fifty percent of these funds to attorney C. Robert McCall of the law firm of Picadio, McCall Kane & Norton to be distributed to its

clients Behm Funeral Homes, Inc., Frank J. Behm, Frank C. Behm, Peggy Behm and Gregory Rohanna. The Clerk shall distribute thirty percent of these funds to attorney Ronald Hicks, Jr. of the law firm of Meyer, Unkovic & Scott to be distributed to his clients Samuel A. Milliken and Daryl Throckmorton. The Clerk shall distribute the remaining twenty percent of these funds to attorney William K. Herrington of the law firm of Faderewski & Herrington to be distributed to his client Paul Lesako.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge